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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

R. V. TURNER, Individually in his former capacity as Superintendent of Glades Correctional Institution, CHESTER LAMBDIN, in his official capacity as Superintendent of Glades Correctional Institution,

Petitioners,

v.

ANTHONY LaMARCA, MARTIN SAUNDERS and EDWIN JOHNSON, individually and on behalf of all others similarly situated, and DAVID ALDRED, STEVE H. BRONSON, JR., EDDIE COBB, RON DURRANCE, and BILLY JOE HARPER, individually,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a trial court may grant injunctive relief in a suit claiming that prison conditions violate the Eighth Amendment proscription against cruel and unusual punishment where there is no determination that the conditions complained of existed due to the wantonness or deliberate indifference of prison administrators responsible for such conditions.

Whether a trial court may grant injunctive relief in respect to prison conditions which intrudes into the administrative minutiae of prison operations and procedures and fails to defer to prison officials in the fashioning of concrete procedures to meet general goals.

Whether the Seventh Amendment requires a jury trial of certain issues in a claim upon which the right to jury trial was previously waived under the provisions of F.R.C.P. 38, but where that claim was subsequently joined in a suit with other claims to which the right of jury trial was preserved and where those certain issues are common to both the claim where the jury trial right was waived and the claims where the right was preserved.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, R. V. Turner, individually, and Chester Lambdin, in his official capacity, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (A1 - 52) is reported at 995 F.2d 1526 (CA 11 1993). The earlier decision of the Court of Appeals declining jurisdiction (A234 - 235) is noted without opinion at 861 F.2d 724 (CA 11 1988). The Phase I opinion of the District Court with Magistrate's Report and Recommendations (A59 - 233) is reported at 662 F.Supp. 647 (S.D. Fla. 1987). The Phase II opinion of the District Court (A236 - 268) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on July 7, 1993 (A54). Petitions for rehearing and rehearing *en banc* were denied on October 4, 1993 (A272 - 275). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant texts of U.S. Const. Amend. VII, VIII and XIV(1) and 42 U.S.C. § 1983 are set forth in the Appendix (A289 - 290).

STATEMENT

The jurisdiction of the United States District Court, Southern District of Florida, was invoked under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331(a) and 1343(3) and (4).

This action for damages and injunctive relief was brought by several former inmates of Glades Correctional Institution (GCI), a large, close-security state prison in Palm Beach County, Florida. It was initiated by the filing of a *pro se* complaint on May 14, 1982, by Anthony LaMarca, a prisoner at GCI against R.V. Turner, Superintendent of the facility. (R1 - 1) Counsel subsequently appeared on LaMarca's behalf and filed an "Amended Complaint Class Action" on September 21, 1983, joining three additional inmates as individual plaintiffs – Martin Saunders, Edwin Johnson and Henry Rosenbaum – and Louie L. Wainwright, Secretary of the Florida Department of Corrections, as a defendant. (R1 - 23) This amended complaint sought money damages under 42 U.S.C. § 1983 for each of the four individual plaintiffs and injunctive relief for a class designated as all present and future inmates of GCI. The plaintiffs claimed to be victims of physical and sexual assaults and intimidation at the hands of other inmates at GCI, and charged that the defendants failed to provide conditions at the prison which adequately assured their safety. Turner and Wainwright, sued in both their individual and official capacities, filed their initial answer in this action on November 2, 1983; through this stage of the proceeding, no party made a demand for a jury trial. (R1 - 41)

On April 13, 1984, the District Judge certified a class, for injunctive relief only, consisting of all present and future inmates confined at GCI; inmates no longer at GCI were excluded from the class. (R1 - 47) Rosenbaum's claim was severed and abated, and the remaining three damage claims and the injunctive prayer were set for evidentiary hearing before a magistrate. (R1 - 61) Turner

retired as Superintendent of GCI in July, 1984, and was eventually succeeded, in October, 1984, by Randall Music. (R1 - 62)

In late August, 1985, approximately two months before the scheduled hearing, the plaintiffs moved for leave to file a second amended complaint, joining seven new Plaintiffs with individual damage claims: David Aldred, Steve H. Bronson, Eddie Cobb, Ron Durrance, Wayne Epprecht, Michael Gordon and Keith Harris. (R1 - 627) This new pleading dropped Wainwright as a defendant and joined Randall Music as a defendant, in his official capacity only, for purposes of the injunctive relief.

The defendants opposed joinder of the new plaintiffs in such close proximity in time to the evidentiary hearing, and filed notice of their intent to seek a jury trial on the claims. (R1 - 67) The Magistrate granted the plaintiffs' requested leave to amend on September 19, 1985; the defendants sought a continuance and responded to the second amended complaint with a motion for more definite statement. (R1 - 69, R2 - 73, 75) The Magistrate continued the hearing date four weeks, until December 2, 1985; the defendants moved for a jury trial and renewed their motion for continuance. (R2 - 80, 91) In the meantime, the plaintiffs sought leave to file a third amended complaint, dropping as plaintiff Keith Harris and joining a new plaintiff, Billy Joe Harper, and providing more specificity in their claims. (R2 - 93)

The Magistrate granted leave to file this third amended complaint on November 25, 1985, and simultaneously denied the continuance and the demand for jury trial as to all claims. (R2 - 105, A55) The defendants

thereafter answered this last complaint with a reiterated demand for jury trial on all claims, and appealed the Magistrate's ruling denying the continuance and jury trial demand to the District Judge who, in turn, denied relief on December 2, 1985. (R2 - 104, 112, A57)

Following two weeks of hearings (the Phase I hearings), the Magistrate issued a Report and Recommendation to the District Judge, essentially supporting the claims of all ten remaining plaintiffs on their individual damage claims.[1] (A102 *et seq.*) The District Judge sustained the recommendations in respect to the individual claims of eight plaintiffs – LaMarca, Saunders, Johnson, Aldred, Bronson, Cobb, Durrance and Harper – and rejected the recommendations as to two – Epprecht and Gordon – and denied their claims. Monetary damages were awarded to the eight, and the Court ordered the

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[1] Each of the plaintiffs' claims involved a separate event, unrelated to each other. In total, the claims spanned a period of some four years, from 1980 to July 1984. The claims and time periods were as follows: LaMarca claimed various instances of harassment from late 1980 through April, 1983; Saunders claimed to have been sexually assaulted in March, 1983; Johnson claimed several instances of sexual harassment and physical assaults at unspecified times in early 1983; Aldred claimed to have been sexually assaulted in July, 1984; Bronson claimed a sexual assault in June, 1982; Cobb was injured in a fight with another inmate in January, 1984; Durrance claimed to have been sexually assaulted in March, 1984; Epprecht was physically assaulted in February, 1981; Gordon was physically assaulted on several occasions in late 1983 to early 1984; Harper claimed a sexual assault in January, 1982. With the exception of Cobb and Saunders, each plaintiff's claim involved a different alleged assailant and each involved a different location within the prison.

establishment of two committees to recommend injunctive relief.[2] (A59 - 101)

Upon appeal, the Eleventh Circuit determined that the judgment was not yet final due to the nature of the ruling on injunctive relief. (A234) On remand, the District Judge dropped the committee concept and, on January 8, 1990, conducted a week-long hearing on the current conditions at GCI, taking evidence for the period from January 1986, the date of the Magistrate's Report, through January, 1990 (the Phase II hearing). (A239, 241) The Judge specifically declined to accept at this hearing additional evidence as to prison conditions during the earlier period considered in the Phase I hearing.[3] (A240) In December, 1986, Music had been replaced as Superintendent by Chester Lambdin, and Lambdin was substituted as a party defendant in his official capacity. (A240)

In his "Findings of Fact and Conclusions of Law" dated April 28, 1990, the District Judge found that conditions at GCI had " . . . changed so that much of the injunctive relief previously requested is no longer necessary." (A241) He further found that Lambdin was a ". . . dedicated public servant who is trying very hard to make

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[2] The Magistrate had "adjourned" full consideration of the class action, injunctive claim when the Plaintiffs indicated that they were not fully prepared to present evidence on the conditions current at GCI in 1985 under Randall Music.

[3] The Defendant, Turner, whose ability to respond to the claims of the plaintiffs due to their late-blooming multiplicity and general lack of specificity prior to the Phase I trial, subsequently proffered a substantial amount of documentary evidence which specifically refuted a number of conclusions drawn by the Magistrate in his Report. The proffer was declined.

GCI an efficient and effective institution." (A242) Nonetheless, because he found that conditions relating to inmate security, conditions in protective confinement, and the provisions for psychological counseling showed room for improvement, the District Judge ordered injunctive relief.[4] (A242) The order specified replacement and cleaning of opaque glass panes in the showers; enforcement by the administration of its rules requiring roving guard patrols; maintenance of metal detectors between two housing compounds and at the main gate of the compounds; elimination of double bunking in confinement cells; elimination of protective confinement stays in excess of 30 days; transfer of all inmates in protective confinement more than 30 days to other institutions; enforcement of a harsh, standard policy in respect to prisoners in possession of contraband drugs, alcohol and weapons; conduct of regular dormitory "shake downs"; disciplining, including termination, of staff members when contraband is discovered in the area of the prison under their responsibility; prompt investigations of all allegations of sexual assault and referral of cases to the state attorney; additional training in rape counseling for the staff psychiatrist and psychologists, and promulgation of a policy of referral of rape victims to counseling.[5] (A256 - 260)

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[4] The question of whether adequate psychological counseling was provided to those claiming to be rape victims was raised for the first time shortly before the January, 1990 hearing.

[5] Many of these provisions such as investigation of assaults and referral to the state attorney, referral of alleged rape victims to psychological counseling and patrol and search procedures were existing policies at GCI.

The Defendants appealed the final judgment which incorporated the monetary damages awarded in the first phase of this litigation and the injunctive relief ordered in the second phase.

The Court of Appeal, Eleventh Circuit, reversed in their entirety the damage awards to the five plaintiffs (Aldred, Bronson, Cobb, Durrance and Harper) whose claims were joined in the second and third amended complaints, finding that the Magistrate and District Judge had improperly denied the defendants' demand for a jury trial. (A45 - 46, 51) It affirmed denial of the demand for jury trial in respect to the claims of the three "original" plaintiffs (LaMarca, Johnson and Saunders) upon the ground of waiver, (A46) but remanded the judgements for these three plaintiffs for reconsideration, finding that the District Judge had failed to apply the proper standard for determining the subjective component of an Eighth Amendment violation under *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991) (A16 - 23); that he had erred in regarding the existence of adverse conditions at anytime during the four year period (1980 - 1984) as satisfying the objective element of all claims rather than those conditions found to exist in the time frame of each claim, (A31) and that he had erred in denying considerations of the defendants' proffer of additional evidence in the mistaken view that he lacked jurisdiction to consider it. (A51) In respect to the injunctive relief, the Court of Appeals noted that the District Judge had not made a determination that GCI currently failed to provide inmates with constitutionally adequate protection from violence, nor had he found that current conditions

in protective confinement violated the Eighth Amendment. (A35)[6] Nonetheless, the Court of Appeals upheld the District Judge's undertaking to grant injunctive relief upon the basis that he had the power to enjoin the recurrence of the unconstitutional conditions that he had found to exist during the period under consideration in the Phase I proceedings (1980-84). (A32 - 34) While thus approving the District Judge's action on injunctive relief in principle, the Court of Appeals found that certain of his prescriptions were overly intrusive,[7] (A37) or failed to address constitutional violations.[8] (A38) On the questions of psychological counseling, the Court of Appeals held that the District Judge has found a constitutional violation and that the record supported a finding that GCI was deliberately indifferent in failing to provide such counseling to rape victims.[9] (A38 - 39) It therefore affirmed the

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[6] The Court of Appeals noted that all parties' arguments on appeal were premised on the current constitutionality of such protection and, in fully reviewing the record, the Court of Appeals concurred with this premise.

[7] E.g., the requirement that Lambdin discipline guards.

[8] E.g., eliminations of double bunking, stays in confinement, transfer of confinement inmates and lighting conditions.

[9] The Plaintiffs did not claim that GCI lacked a mental health staff or that it refused requested mental health services. They contended that the policy at GCI was not "pro-active" and that the mental health professionals were not specifically trained in rape counseling. The uncontradicted evidence established that GCI had both psychiatric and psychological professionals and that Florida instituted a policy in 1987 at all prisons, including GCI, of referring inmates reporting sexual assaults to the mental health staff. Only one inmate claimed not to have had such a "pro-active" referral after that date; evidence on the issue as to his referral was contradictory.

injunctive relief granted on this last subject. It also affirmed a number of specific provisions of injunctive relief in respect to inmate safety despite the fact that they intruded into the sphere of adminstrative minutiae.[10]

REASONS FOR GRANTING THE PETITION

I.

THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S ISSUANCE OF INJUNCTIVE RELIEF CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL AND PRESENTS IMPORTANT ISSUES OF FEDERALISM AND CONSTITUTIONAL INTERPRETATION.

A direct and irreconcilable conflict exists between the Eleventh Circuit and the Supreme Court regarding the issue of injunctive relief in prisons. The Eleventh Circuit's Judgment in *LaMarca* also conflicts with orders entered by various other Courts of Appeal granting injunctive relief. The problems associated with the operation of prisons are widespread and constitute an important public interest.

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons . . . . The strong considerations of comity that require giving a state court system

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[10] E.g., the maintenance and location of metal detectors, the use of specific search methods for location of contraband and the replacement and maintenance of glass windows for viewing into the shower areas in the dorms.

> that has convicted a defendant the first opportunity to correct the errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.

Preiser v. Rodrigues, 411 U.S. 475, 491-92, 93 S.Ct. 1827, 1837-38, 36 L.Ed.2d 439 (1973). *See also Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981).

A.

THE COURT OF APPEALS' AFFIRMANCE OF INJUNCTIVE RELIEF WHERE THERE WAS NO FINDING THAT THE CONDITIONS COMPLAINED OF EXISTED AS A RESULT OF WANTONNESS OF PRISON OFFICIALS CONFLICTS WITH THIS COURT'S RULING IN *WILSON V. SEITER* THAT SUCH A FINDING IS AN ESSENTIAL COMPONENT IN A DETERMINATION OF A CONSTITUTIONAL VIOLATION.

In *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), this Court carefully laid out the analytical structure for consideration of claims brought under 42 U.S.C. § 1983 alleging that prison conditions violate the rights of inmates under the Eighth Amendment to the United States Constitution. Noting that the Amendment proscribes only the infliction of "cruel and unusual punishments", the *Wilson* opinion discerned two essential components of an Eighth Amendment violation wrought by conditions of confinement: an objective component consisting of the existence of conditions sufficiently harsh and inhumane to be regarded as "cruel and unusual" under contemporary societal norms, and a subjective component consisting of an intent, proven directly

or inferred from wantonness, by officials responsible for such conditions that they be inflicted on the inmates.

Finding this subjective component in the fact that the Eighth Amendment proscribes "punishment" and not merely harsh conditions, this Court quoted approvingly the observation of Judge Posner in *Duckworth v. Franzen*, 780 F.2d 645, 652 (CA 7 1985):

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today, it is what it meant in the eighteenth century.

Wilson 111 S.Ct. at 2325.

Under *Wilson's* analysis, the finding of both components is essential in establishing the existence of a constitutional violation. Thus, absent the requisite subjective element of intent, prison conditions – harsh though they may be – cannot constitute cruel and unusual *punishment* and, consequently, cannot violate the Eighth Amendment.

The Court of Appeals in the decision below, acknowledges the dual component requirement of *Wilson*, but treats it as addressing ultimate liability for damages rather than as the prior analytical step in determining the existence of a constitutional violation. As a consequence, its decision effectively denies the necessity of determining intent or wantonness on the part of prison officials as a predicate for the granting of injunctive relief – which, of course, it must be if it is an essential element in forming the constitutional violation. In so doing the Court of Appeals decision misconstrues the effect of, and conflicts with the holding in, *Wilson*.

In reviewing the District Court's grant of injunctive relief, the Court of Appeals acknowledged that where, as here, the basis for invoking the use of Federal judicial power is an alleged constitutional violation by state authorities, "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . " *Milliken v. Bradley*, 433 U.S. 267, 282, 97 S.Ct. 2749, 2758, 53 L.Ed.2d 745 (1977). *See also Swann v. Charlotte - Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971). Accepting as a premise that the District Court's injunctive power could only have been exercised in this case upon a determination that conditions at GCI at some time violated the Eighth Amendment's prohibition against cruel and unusual punishment, the Court of Appeals affirmed the lower Court's grant of injunctive relief in general – although it reversed the injunctive order in certain particulars – on the basis that the present prison administration " . . . had not taken sufficient steps to ensure that GCI's past wrongs would not be repeated." (A33) In reviewing the District Court's injunctive order, and in its own independent review of the Phase II record, the Court of Appeals concluded that the current conditions at GCI respecting both inmate safety and the conditions in confinement did not violate constitutional standards. It further concluded that the failure to provide rape counselling had been held by the District Court to violate constitutional standards and that such a finding was

supported by the record.[11] Nonetheless, the Court of Appeals affirmed the District Court's exercise of its injunctive power in all three areas, including inmate safety and protective confinement conditions, on the ground that:

> The district court, in the damages phase of the case, found that GCI failed to provide inmates with reasonable protection from violence.
>
> (A33)

and that:

> When a defendant corrects the alleged infirmity after suit has been filed, a court may nevertheless grant injunctive relief unless the defendant shows that absent an injunction, the institution would not return to its former, unconstitutionally deficient state.
>
> (A32)

In its same opinion, however, the Court of Appeals had determined that the District Court's findings in Phase I (the damages phase) had failed to establish that the defendant had exhibited wantonness in accord with the standard prescribed in *Wilson v. Seiter*, supra. Thus all that remained of the Phase I findings to support a determination of unconstitutionality of prior conditions at GCI was, at most, the District Court's abstract holding as to the "objective unreasonableness" of those conditions in

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[11] The District Court had considered the issuance of injunctive relief in respect to three broad areas of conditions: inmate safety, protective confinement and rape counselling.

respect to the claims of three claimants.[12] The necessary conflict with *Wilson* is thus manifest: *Wilson* holds that an Eighth Amendment violation is shown in a prison conditions case only when the presence of both the objective component and subjective component of "cruel and unusual punishment" are established; the Court of Appeals in *LaMarca* – which acknowledges the necessity of the existence of a constitutional violation, either currently or "historically", to support the grant of injunctive relief – holds that the required finding of a constitutional violation was satisfied solely by the Phase I finding of "objective unreasonableness" of the conditions at GCI and without the determination, in either Phase I or Phase II, of the subjective component of wantonness on behalf of those responsible for overseeing prison conditions.[13]

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[12] The Court of Appeal's remand of these claims (those of the "original plaintiffs") for reconsideration included an instruction that the District Court redetermine whether the conditions were "objectively unreasonable" at the relevant time frame for each claim; while it did not necessarily reverse the finding that at some point between 1980 - 84 the conditions were "objectively unreasonable" such a finding is, at present, unconnected to any claim. (See also ftn. 29 in the Court of Appeals opinion, A33)

[13] In the third area of prison conditions addressed by the trial court's injunction – the matter of rape counselling – the Circuit Court commented that, "(t)he [trial] Court found that GCI unnecessarily and wantonly inflicted pain upon prisoners by failing to provide them with post-rape psychological or psychiatric counselling." In form this appears to satisfy the *Wilson* standard in respect to this one area in which relief was granted; in fact the District Court's order fell far short of meeting that standard. It's finding on this subject was as follows:

> e) In light of the past and present circumstances at GCI, and the findings of psychological problems

Nor was this conflict with the essential holding in *Wilson* a mere oversight, for the precise implications of the Court of Appeal's ruling was raised in the Defendant's petition for rehearing which was denied by the Court. It must be concluded, therefore that the Eleventh Circuit views the rule in *Wilson* to be that an Eighth Amendment violation is established whenever there is a finding of objective unreasonableness of prison conditions and that the finding of an element of wantonness on the part of prison officials is necessary only as an additional element necessary to establish a damage claim brought against those officials in their individual capacities. Where the claim is one for injunctive relief against the institution or against the prison officials in their official capacity, it appears to be the clear holding of this case that relief may be granted when the only finding is that the conditions are unreasonably harsh and when there is no finding that the prison administration intended to impose these conditions on the inmates.

If Wilson correctly discerns that the subjective and objective elements are essential components of an Eighth Amendment violation, then both elements must be found before either injunctive or damage relief may be granted. *See Helling v. McKinney*, ___ U.S. ___, 113 S.Ct. 2475 (1993).

> accompanied by homosexual assault in a prison setting, the court finds that the GCI officials have a duty to protect the health of rape victims within their compound. The failure to do so will surely result in the unnecessary and wanton infliction of pain. (A253)

Such a "finding" clearly falls short of a proper determination of existing intent or deliberate indifference by prison officials necessary to establish a constitutional violation.

By contrast, the effect of the Circuit rule here, which permits the intrusion of the District Courts into prison administration upon no more than a finding of the harshness of prison conditions, will be to open the door to the use of injunctive process even in the absence of a constitutional violation. Such a rule has broad implications. The District Courts will become, to a greater extent than previously foreseen, super-administrators of the States' prison systems. See *Bell v. Wolfish*, 441 U.S. 520, 562, 99 S.Ct. 1861, 1886, 60 L.Ed. 447 (1979).

B.

THE COURT OF APPEALS AFFIRMANCE OF CERTAIN SPECIFIC ITEMS OF INJUNCTIVE RELIEF CONFLICTS WITH THE PRINCIPLES LAID DOWN IN THIS COURT'S HOLDING IN *BELL V. WOLFISH* AND ILLUSTRATES THE CONTINUING CONFLICT AMONG THE CIRCUITS AS TO WHAT CONSTITUTES AN IMPROPER INTRUSION INTO THE DETAILS OF PRISON ADMINISTRATION BY THE DISTRICT COURTS.

This Court recognized that many courts have:

> . . . become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially

> devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution . . . . The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

Bell v. Wolfish, 441 U.S. 520, 562, 99 S.Ct. 1861, 1886, 60 L.Ed.2d 447 (1979).

While many Courts of Appeal have approved the granting of injunctive relief in the area of prison operation, they have done so with caution. Federal courts lack the power to interfere with decisions made by state prison officials, absent constitutional violations. See *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). "The function of a Court is limited to determining whether a constitutional violation has occurred . . . and to fashioning a remedy that does no more and no less than correct that particular constitutional violation." *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (CA 9 1982).

Importantly, the Courts have given prison officials the opportunity to propose the methods necessary to alleviate the unconstitutional conditions. "In contrast to the vast majority of Federal judges, prison administrators possess a wealth of penological expertise and experience that qualifies them to supervise, discipline and rehabilitate inmates within the ever-changing, complex prison

system." *Godinez v. Lane*, 733 F.2d 1250, 1262 (CA 7 1984). In recognition of the expertise required and principles of comity and federalism, other courts have deferred to parties to propose remedies. See *United States v. Michigan*, 940 F.2d 143 (CA 6 1991); *Eng v. Smith*, 849 F.2d 80, 83 (CA 2 1988); *Cody v. Hilliard*, 599 F.Supp. 1025 (D.S.D. 1984), *rev'd in part on other grounds* 830 F.2d 912 (CA 8 1987). Addressing a myriad of issues related to prison administration including, but not limited to inmate security, medical needs, housing, access to the law library and confinement, these decisions all leave to prison officials the ultimate details of correcting the constitutional violations. The above decisions of the Supreme Court and other Courts of Appeal indicate an unwillingness to permit judges to engage in micromanagement of prison operations.

However, some courts have refused to defer to prison officials to remedy constitutional violations once identified. *Gluth v. Kangas*, 951 F.2d 1504 (CA 9 1991); *Toussaint v. McCarthy*, 801 F.2d 1080 (CA 9 1986); *French v. Owens*, 777 F.2d 1250 (CA 7 1985). These cases involved issues similar to those where courts deferred to prison officials to fashion relief. The conflict becomes even more clear because once courts determine the need for injunctive relief, they are not uniform in the nature of relief ordered. It is difficult to reconcile the relief ordered in *LaMarca, Gluth, Toussaint* and *French* with the relief ordered in other courts which has been limited to the ordering of policies and procedures instead of mapping out the details of prison operations. *See Hoptowit, supra; Jones v. Diamond*, 636 F.2d 1364, 1383 (CA 5 1981); *Cody v. Hilliard*, 830 F.2d 912 (CA 8 1987). It is left to this Court to resolve

this conflict and clarify the role of the courts in remedying constitutional violations.

The decision in *LaMarca* is erroneous and unduly intrusive in two respects. First, the Eleventh Circuit upheld aspects of the District Court's grant of injunctive relief although the trial court failed to defer to prison officials to fashion the remedies. Secondly, the relief ordered was specific and highly intrusive, interfering with the daily operation of the prison. Location and maintenance of metal detectors and the type and transparency of glass in the showers and methods of search and patrol are exactly the types of operations minutiae that certain other circuits have refrained from dictating. Similarly, the training of guards or staff are details of prison administration that the Ninth Circuit has specifically refused to mandate. *Hoptowit, supra* at 1250. However, the Eleventh Circuit, herein, has affirmed the District Court's order requiring training for guards in handling of rape complaints. This relief is overly broad, requiring each prison guard to be trained to take rape complaints where alternative procedures – such as having at least one person able to handle this task present at the institution at all times – would equally suffice. The requirement that both the psychiatrist and the psychologist be specially trained to provide rape counselling is similarly intrusive into the operation of the prison. Competent rape counselling may be properly provided by either the psychiatrist, the psychologist or other mental health personnel depending upon the specific operational plans of the institution. Certainly, these remedies are not the least intrusive methods to accomplish the District Court's goal. The relief affirmed by the Eleventh Circuit

clearly indicates that design and implementation of remedies are tasks best left to the state authorities who have the necessary specialized knowledge and training in the area of prison administration.

The Eleventh Circuit has exceeded its authority and ruled contrary to the principles laid down by this Court and other Courts of Appeal in affirming various aspects of injunctive relief ordered by the District Court. An order of injunctive relief in one prison may have a widespread effect on prisons and prison administrators throughout the nation, as they suffer uncertainty about whether or not the Courts in their Circuit potentially could subject them to the same type of intrusive injunction affirmed by the Eleventh Circuit. This uncertainty would hamper prison officials in operating their respective institutions due to the fear of judges second-guessing decisions about minor details. The importance of this issue and its potential influence on prison operations nationwide require the Supreme Court to resolve the conflict and confusion among the circuits.

II.

THE AFFIRMANCE OF THE DISTRICT COURT'S DENIAL OF A JURY TRIAL UPON THOSE ISSUES IN THE CLAIM OF THE "ORIGINAL PLAINTIFFS" WHICH ARE COMMON TO THE ISSUES IN THE CLAIMS OF THE "NEW PLAINTIFFS" CONFLICTS WITH THE PRINCIPLE ENUNCIATED IN THIS COURT'S DECISION IN *LYTLE V. HOUSEHOLD MANUFACTURING* SINCE IT WILL HAVE THE EFFECT OF ALLOWING THE TRIAL COURT'S DETERMINATION OF THE ISSUES IN THE FORMER CLAIMS TO CONTROL THE DETERMINATION OF THE ISSUES IN THE LATTER.

The Circuit Court decision below correctly determined that the District judge had erred in denying the

defendants' demand for jury trial upon the claims of the "new plaintiffs" joined in the second and third amended complaints since, as to these claimants, the defendant's demand was timely under F.R.C.P. 38(b).[14] It affirmed, however, the District judge's denial of a jury trial upon all issues in the claims of the "original plaintiffs" – LaMarca, Johnson and Saunders – on the ground that the defendants had not timely sought a jury trial as to these claimants, and that there was no constitutional implication in the determination of the issues of these claims by the court. This last holding is in direct conflict with the principles set down by this Court in the case of *Lytle v. Household Manufacturing*, 494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990), for allowing the non-jury determinations to stand upon any issues in the claims of the "original plaintiffs" which are common to the issues in the claims of the "new plaintiffs" will, through the effect of issue preclusion, effectively deny the right of the defendants to a jury trial of those common issues on the claims of the "new plaintiffs."

Each claim by each plaintiff presented a series of issues, most of which were unique to each claim; one issue, however, possessed elements common to the claims of certain of the "original plaintiffs" and certain of the "new plaintiffs."[15]

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[14] Of the eight "new plaintiffs" joined in these two pleadings, one was voluntarily dropped and the claims of two were denied on the merits; five remain: Aldred, Bronson, Cobb, Durrance and Harper.

[15] The non-common issues include whether each alleged assault occurred; whether it was causally related to any unconstitutional conditions, the damages sustained by any plaintiff,

Among the "original plaintiffs", LaMarca's claims were predicated upon allegedly unconstitutional conditions at GCI existing from late 1980 through April 1983.

Among the "new plaintiffs", Bronson's claim was based upon allegedly unconstitutional conditions in June, 1982 and Harper's claim was based upon conditions in January, 1982. Clearly, there is an overlap of this issue between the claims of LaMarca and the claims of Bronson and Harper since they each concern a common time frame. By permitting the determination of the issues relating to unconstitutionality of conditions in LaMarca's claim to be determined non-jury threatens the right of the defendant, Turner, to have the issues relating to unconstitutionality of conditions in Harper's and Bronson's claim decided by a jury.

In *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) and *Dairy Queen Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962) this Court determined that where joined claims involve common issues, some of which are triable as of right by a jury and others which, due to the equitable nature of the claims, are triable non-jury, the determination of the issues by the jury must prevail. In *Lytle*, a case involving claims brought by a plaintiff under 42 U.S.C. § 2000*e et seq.* ("Title VII" claims which, at the time, were triable non-jury) and 42 U.S.C. § 1981 (claims for which a right to jury trial exists), the separate claims involved certain

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and, in respect to several of the claims (those occurring after the Spring of 1983) the issues of the objective unreasonableness of condition and wantonness on the part of Turner.

common issues. The trial judge improperly dismissed the claim brought under 42 U.S.C. § 1981 and resolved the issues on the claim brought under Title VII against the plaintiff. The Court of Appeals affirmed the findings on the Title VII claims, but noted that the dismissal of the claim under 42 U.S.C. § 1981 was erroneous; however, since the claims had common issues, and since the determination of those issues in the Title VII claim foreclosed liability under 42 U.S.C. § 1981, it affirmed. This Court reversed the dismissal of the claim under 42 U.S.C. § 1981 and, to avoid the operation of issue preclusion by the prior decision on the Title VII claim, reversed the latter and ordered that the trial court's determination of the issues in that claim be subordinated to the jury's determination of the issues in the claim under 42 U.S.C. § 1981.

The present case parallels *Lytle* with near precision: here there were certain claims upon which the defendant had a clear right to jury trial (the claims of the "new plaintiffs") and certain claims upon which the defendant did not – because of a prior waiver – retain the right to a jury trial (the "original plaintiffs"). As noted, some of these claims had common issues. Under *Lytle*, the determination of those common issues on the claim of at least one of the "original plaintiffs" should be subordinated to the jury's determination now required on the claims of the "new plaintiffs." The failure of the Court of Appeals to reverse the findings as to the LaMarca claim and to require that its determination be subordinated to the resolution of common issues in the claims of Bronson and Harper jeopardizes the constitutional right of the defendant, Turner, to a jury trial as to the latter claims. The Court of Appeals statement that such a constitutional

basis does not exist for requiring a jury resolution of the common issues on the LaMarca claim conflicts directly with *Lytle* where this court found that the Seventh Amendment is indeed implicated in such situations.

CONCLUSION

The Petitioners respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

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No. 93-1085

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In The

Supreme Court of the United States

October Term, 1993

R. V. Turner, individually in his former capacity as Superintendent of Glades Correctional Institution, Chester Lambdin, in his official capacity as Superintendent of Glades Correctional Institution,

Petitioners,

v.

Anthony LaMarca, Martin Saunders and Edwin Johnson, individually and on behalf of all others similarly situated, and David Aldred, Steve H. Bronson, Jr., Eddie Cobb, Ron Durrance, and Billy Joe Harper, individually,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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Anthony LaMARCA, Martin Saunders and Edwin Johnson, individually and on behalf of all others similarly situated, and David Aldred, Steve H. Bronson, Jr., Eddie Cobb, Ron Durrance, Wayne Epprecht, Michael Gordon and Billy Joe Harper, individually, Plaintiffs-Appellees,

v.

R.V. TURNER, individually in his former capacity as Superintendent of Glades Correctional Institution, Chester Lambdin, in his official capacity as Superintendent of Glades Correctional Institution, Defendants-Appellants.

No. 90-5909.

United States Court of Appeals,
Eleventh Circuit

July 7, 1993.

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and WILLIAMS,* Senior Circuit Judge.

TJOFLAT, Chief Judge.

This is a suit brought by ten present and former inmates of Glades Correctional Institution (GCI), a Florida prison. They seek individually, under 42 U.S.C. § 1983 (1988), money damages for cruel and unusual punishment they allege they suffered because of the deliberate indifference of a former superintendent of the institution, Randall Turner. The plaintiffs still housed at GCI also

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* Honorable Jerre S. Williams, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

seek an injunction, on behalf of all present and future inmates at the prison, against the current superintendent, Chester Lambdin, to correct certain allegedly unconstitutional conditions of confinement.

After the parties joined issue (on the plaintiffs' third amended complaint), the district court, having denied Turner's demand for a jury trial, tried the ten damages claims and entered judgment for eight of them.[1] Turner appealed, but we dismissed the appeal for want of a final judgment as the district court had not disposed of the still pending claim for injunctive relief. *LaMarca v. Turner*, 861 F.2d 724 (11th Cir.1988) (Table) (the first appeal). After our order dismissing the appeal reached the district court, Turner moved the court to reopen the record on the plaintiffs' damages claims so that he could introduce some additional evidence on the issue of liability. The court, concluding that it lacked jurisdiction to revisit those claims, denied the motion. The court then turned to the claim for injunctive relief.

After hearing five days of testimony relating to the current conditions of confinement, the court identified several areas of concern that "require[d its] attention." Although the challenged prison conditions had improved considerably, the court concluded that injunctive relief was necessary. The court's final judgment therefore granted injunctive relief and the money damages previously awarded, along with attorney's fees under 42 U.S.C. § 1988 (1988). The instant appeal is from that final

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[1] As we explain in the text *infra*, a magistrate judge actually heard the claims; the district court disposed of them after considering *de novo* the former's report and recommendation.

judgment. Turner appeals the damages awards; Lambdin appeals the injunction.

We now vacate all of the damages awards and remand them for further proceedings. We do so as to five of the appellees because the court should have honored Turner's demand for a jury trial. As to the three remaining appellees, the court applied the wrong legal standard for Eighth Amendment damages liability and, moreover, erred in concluding that it lacked jurisdiction (following dismissal of the first appeal) to reopen the record and entertain the evidence Turner proffered in defense of the damages claims. Finally, we vacate in part the injunction against Lambdin and remand the matter of equitable relief for further proceedings.

Part I of this opinion outlines the case's procedural history and describes the facts underlying the damages claims and the claim for injunctive relief. Part II rejects Turner's arguement that the plaintiffs failed to present sufficient evidence to prevail, but holds that the district court applied the wrong legal standard for Eighth Amendment liability for money damages. Part III addresses the district court's grant of injunctive relief. Part IV considers Turner's Seventh Amendment jury demand. Finally, part V reviews Turner's attacks on the trial court's treatment of his motions to continue and to augment the trial record.

I.

A.

On May 14, 1982, Anthony LaMarca, then an inmate at GCI, filed a handwritten *pro se* complaint in the district court stating that he had "been countlessly approached, threatened with physical violence and assaulted by other inmates at [GCI] because [he] refused to participate in homosexual activities, or pay protection to be left alone."[2] He alleged that "a severe lack of protection" existed at GCI and that "the institution seem[ed] unable or unwilling to handle the situation." On September 21, 1983, LaMarca, having obtained counsel, filed an amended complaint adding three other GCI prisoners as plaintiffs, Martin Saunders, Edwin Johnson, and Henry Rosenbaum.[3] Each prisoner sought damages under 42 U.S.C. § 1983, and, as class representatives, "injunctive relief for all . . . present and future inmates of GCI."[4] On

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[2] A more detailed exposition of the facts supporting the plaintiffs' damages claims is set out in the magistrate judge's Report and Recommended Findings of Fact and Conclusions of Law, *LaMarca v. Turner*, 662 F.Supp. 647, 667-717 (S.D.Fla.1987), which the district court reviewed *de novo* and adopted in all relevant parts, *see id.* at 650-667. The court's subsequent order granting injunctive relief was not published.

[3] The court later severed Rosenbaum's claim, and it is not before us.

[4] On April 13, 1984, the district court certified a class of "all those persons who are or will be incarcerated at the Glades Correctional Institution located in Belle Glade Florida." *See* Fed.R.Civ.P. 23(a), (b)(2).

November 2, 1983, the defendants, Turner and Lambdin, filed their answer to the first amended complaint.[5]

On August 26, 1985, more than a year and half after the defendants answered the first amended complaint, the plaintiffs moved the court to amend the complaint a second time, adding seven plaintiffs, David Aldred, Steve H. Bronson, Jr., Eddie Cobb, Ron Durrance, Wayne Epprecht, Michael Gordon, and Keith Harris. Each alleged that he was assaulted while an inmate at GCI, and sought damages against Turner under 42 U.S.C. § 1983.

The defendants objected to the joinder of these additional plaintiffs, claiming that the joinder would unreasonably burden their preparation for trial which was then set for November 4, 1985. Nevertheless, the magistrate judge who was to hear the case granted plaintiffs' motion to amend.[6] The defendants immediately requested a continuance of the trial, arguing that in light of the presence of the seven new plaintiffs, they required at least ninety days for additional discovery and trial preparation. The magistrate judge granted the defendants a one-month continuance, resetting the trial for December 2, 1985, on

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[5] Actually, Turner answered the first amended complaint. Lambdin was not made a defendant until he became superintendent of GCI in December 1985. For convenience we refer to Lambdin throughout the opinion as the defendant for the injunctive relief claim.

[6] The district court had referred the case to a magistrate judge to conduct an evidentiary hearing on all claims and to prepare a report and recommendation. *See* S.D.Fla.Mag.J.R. 1(f). We refer to this hearing as the "trial" or the "damages trial."

November 8, 1985, the defendants filed a demand for jury trial "of all issues so triable."[7]

On November 13, 1985, Turner and Lambdin requested another continuance, claiming that they could not complete discovery and prepare for trial by the December 2 trial date. Two days later, before the court could act on the motion, the plaintiffs moved the court for leave to file a third amended complaint, adding another plaintiff, Billy Joe Harper, who sought damages against Turner, and dropping Harris from the suit. The court referred both motions to the magistrate judge. On November 28, the magistrate judge gave the plaintiffs leave to amend, but refused to grant the defendants a continuance or a jury trial. The defendants, pursuant to S.D.Fla.Mag.J.R. 4(a), immediately appealed the magistrate judge's rulings to the district court. On December 2, the court affirmed these rulings and the trial began.

To summarize, on December 2, the case proceeded to trial on the allegations of the third amended complaint. This complaint stated section 1983 claims for damages against Turner, individually, by LaMarca, Saunders, and Johnson (the original plaintiffs), and Aldred, Bronson, Cobb, Durrance, Epprecht, Gordon, and Harper (the new

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[7] The defendants made their jury demand, but did not answer the second amended complaint. Their failure to file an answer became unimportant when, as the following text indicates, the plaintiffs obtained leave to file a third amended complaint. Because the parties, below and on appeal, have assumed that the original jury demand was timely as to the third amended complaint, we do not address whether the demand actually was timely.

plaintiffs). The original plaintiffs also served as representatives for purposes of the class action claim for injunctive relief against Lambdin in his official capacity as superintendent of GCI.

B.

The magistrate judge, operating under S.D.Fla.Mag.J.R. 1(f), commenced the bench trial. At the plaintiffs' request, the magistrate judge bifurcated the proceeding, indefinitely postponing consideration of the claim for injunctive relief. The trial, therefore, considered only the damages claims against Turner. The following is a brief statement of the facts the court found.[8]

The inmate assaults complained of occurred between 1981 and 1984, during Turner's tenure as superintendent. GCI had four dorms ("A", "B", "C", "D").[9] The A and D dorms each had two wings containing three rows of twenty bunk beds. The B and C dorms were smaller, but also had bunk beds arranged in three rows. Each dorm had a shower, located at one end of the building, and a "wicket," or cage, located in the center of the dorm, that provided officers with a vantage point from which to observe the inmates. A guard's view from the wicket into the interior of the dorm and the shower area was

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[8] We recite the facts explicitly found by the magistrate judge and adopted by the district court. We also recite facts that we consider to have been implicitly found, because they were not in dispute. Since we must vacate and remand the money judgments for the plaintiffs, the district court's findings of fact will not be binding in the subsequent proceedings in this case.

[9] GCI also had an "honor" dorm not relevant in this case.

obstructed by sheets and towels the inmates hung from their bunk beds, the placement of bunk beds next to the isles leading to the shower area, and opaque glass on the shower door. While officers were supposed to patrol the interiors of the dorms regularly, they did not.

The prison also maintained cells for disciplinary, administrative, and protective confinements. This special detention suffered from substandard conditions. The cells lacked adequate ventilation, had poor lighting, and were infested with roaches and vermin. Prisoners were allowed little or no exercise, only three showers a week, no canteen privileges, and only limited use of the law library. Inmates in the general population could gain access to the confinement area by crawling under a poorly maintained fence or with the permission of the guard in charge of the area. These confinements, therefore, failed to insulate inmates from their tormentors. Finally, an inordinate number of inmates requested protective confinement, leading to overcrowding and indicating that a serious problem existed in the general population. The court found that the conditions in protective confinement were substandard, and therefore discouraged inmates from remaining in this potential safehaven.

Turner, in a July 16, 1981 letter to his superior, described the prevailing atmosphere at GCI: "On an almost daily basis I feel that our security staff is simply being tolerated by the inmate population rather than being in control of the operation of the institution." *LaMarca*, 662 F.Supp. at 673. The presence of contraband (weapons, alcohol, and drugs), corruption of GCI's staff,

inmate violence, and homosexual activity were accepted as part of prison life.

While a minimal level of contraband may be an unavoidable aspect of prison life, excessive quantities of contraband flowed freely into and within the prison. Prison officials made "little or no effort . . . to control illicit activity at GCI, resulting in readily-available contraband." *Id.* at 657. Inmates carried knives and openly used drugs. The contraband problem was compounded by staff corruption, as prison officials contributed to, and apparently profited from, the contraband, and utilized prisoners to "control" and punish other prisoners.

GCI's staff permitted regular, unsupervised showings of hard-core pornographic movies. As Dr. Swanson, an expert witness for the plaintiffs, testified, these movies "would only serve to maximize the possibility of sexual and other violence." Indicative of this observation, during the movies, "[s]ounds of inmates screaming and crying could be heard."

When alerted to specific dangers, prison staff often looked the other way rather than protect inmates. Rather than offer to help, the staff suggested that the inmates deal with their problems "like men," that is, use physical force against the aggressive inmate.[10]

Several management problems persisted during Turner's tenure as superintendent: low morale among the

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[10] The acceptance of this condition might be best illustrated by LaMarca's story (taken as credible by the district court) that when he asked a guard for protection, the guard gave him a knife.

prison's staff, high employee turnover (leading to a less experienced staff), high vacancy rates for staff positions, and inadequate supervision of employees.[11] As Turner confirmed, these problems had a direct effect on GCI's ability to maintain security. Certain of the prison's standard operating procedures were insufficient to protect prisoner safety. For example, the procedures for investigating rapes, to the extent such procedures existed, were not followed; some of the reported incidents were not investigated at all. The lack of such procedures created an atmosphere of tolerance of rape which enhanced the risk that incidents would occur. *id.*, at 678 (finding an atmosphere where "inmates could rape other vulnerable inmates without concern of being the detected or deterred").

Aggression was commonplace and exacerbated by the readily available contraband and an excessively permissive atmosphere. While underfunding, overcrowding, and a lack of security personnel no doubt contributed to these problems, Turner could have controlled the permissive atmosphere through proper supervision and could

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[11] In a survey, when GCI's staff were asked, " 'Did you receive instructions or guidelines on the responsibilities and supervisory functions of your job when you became supervisor?,' they answered with a 'resounding no.' " *Id.* at 674. The Department of Corrections, Office of Inspector General observed that "we fail to understand and appreciate laxity, in some instances, the disregard for established procedures." *Id.* The court found that when staff engaged in egregious conduct, "so gross that immediate action should have been taken." Turner did not act. *Id.* at 675. This "underscore[d] the day-to-day operation of GCI with its staff not controlled by Superintendent Turner." *Id.* at 677.

have remedied the contraband problems with inexpensive modifications to the prison's procedures and physical plant. In sum, as the court concluded, "Turner's overall laxity in managing and controlling his staff" directly contribute to an unconstitutional condition of confinement at GCI consisting of an undeterred atmosphere of violence. *Id.* at 662, 684.

For purposes of this appeal, the appellants concede the credibility of the plaintiffs' accounts of the alleged assaults. A group of inmates, one brandishing a bush ax, made an unsuccessful attempt sexually to assault LaMarca in a dorm. Inmates raped Saunders in a small bathroom adjacent to the confinement area; he reported the incident but officials did not investigate and refused his request for a medical examination. Inmates repeatedly attacked Johnson while he was in protective confinement. Inmates raped Aldred and Durrance in shower areas. Aldred reported the incident to an officer, but there was no investigation. Bronson was sexually assaulted with the handle of a baseball bat on GCI's recreation field. Cobb was stabbed by an inmate who, because of his cooperation with guards in conducting illicit activities, was protected.

C.

On January 8, 1986, after the parties had filed proposed findings of fact and conclusions of law, and had argued them before the magistrate judge, the magistrate judge issued a 135-page "Report and Recommendation" recommending a specific damages award for each of the ten plaintiffs. The district court reviewed the magistrate

judge's report *de novo, see* Federal Magistrate's Act, 28 U.S.C. § 636(b)(1) (1988); S.D.Fla.Magis.J.R. 4(b), and adopted his recommendations in all relevant detail as to eight of the plaintiffs.[12] The court entered judgment accordingly on June 4, 1987.[13]

As noted earlier, although the district court had neither addressed nor disposed of the claim for injunctive relief, Turner appealed to this court. We dismissed the appeal for want of a final judgment and returned the case to the district court for further proceedings on that claim.

D.

On the first day of trial before the district court on the claim for injunctive relief, David M. Lipman, counsel for the inmate class, conceded that the atmosphere at GCI had changed "in such a manner that as to [many] conditions and practices, [the class] no longer [sought] injunctive relief."[14] Although the district court observed that

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[12] The court concluded, however, that two plaintiffs, Epprecht and Gordon, had not proven that Turner's deliberate indifference to their need for safety caused their injuries. *LaMarca*, 662 F.Supp. at 665. Epprecht and Gordon have not appealed.

[13] The court granted monetary awards to Anthony LaMarca, $9,000, Edwin Johnson, $13,000, Eddie Cobb, $6,500, and Martin Saunders, David Aldred, Steve H. Bronson, Ron Durrance, and Billy Joe Harper, each $30,000. *LaMarca*, 662 F.Supp. at 667, 715.

[14] Lipman was still concerned about the adequacy of the security GCI's staff was providing the inmates, the conditions surrounding the protective confinement cells, the ready availability of counseling for inmates who had been raped, and the presence of contraband, in particular weapons and drugs.

Superintendent Lambdin "appears to be a dedicated public servant," and that physical conditions at GCI were "generally satisfactory," the court found "ample room for improvement in the conditions at GCI." In the court's view, the superintendent and his staff still did not take the threat of inmate violence seriously enough. In particular, they failed to ensure that GCI's policies designed to protect prisoners, including regular security patrols, were properly carried out. Finally, the court concluded that GCI's failure to make adequate psychological counseling available to rape victims constituted cruel and unusual punishment because it constituted deliberate indifference to a serious medical need.[15] *See generally Estelle v. Gamble*, 429 U.S. 97, S.Ct. 285, 50 L.Ed.2d 251 (1976).

Concluding that Lambdin had not shown that "the wrongs of the past could not reasonably be expected to recur," the court ordered injunctive relief. On October 6, 1990, the court entered a final judgment (1) providing such relief, (2) incorporating by reference the judgment it had entered on June 4, 1987, which awarded eight of the plaintiffs money damages against Turner, and (3) awarding the plaintiffs attorney's fees.

II.

Turner challenges the court's determination that he was deliberately indifferent to the plaintiffs' safety in

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[15] The court cited as evidence of GCI's indifference to this medical need the testimony of GCI's staff psychiatrist, who stated that in his 15 years on the staff he had never been consulted regarding an inmate who had been sexually assaulted.

violation of the Eighth Amendment and 42 U.S.C. § 1983. He asserts that the plaintiffs failed to make out a case of liability against him – in particular, he claims that the evidence does not support the district court's findings of fact – and that the court applied the wrong legal standard in determining liability. We conclude that although the record contains sufficient evidence upon which the district court could find liability, the court failed to make certain essential findings of fact and erred in its legal analysis. Consequently, we return this case to the district court for further consideration.

In subpart A, we review the elements necessary to establish Turner's liability for money damages under section 1983 and the sufficiency of the evidence presented as to each element. We review the evidence presented at trial in the light most favorable to the plaintiffs. *Whitley v. Albers*, 475 U.S. 312, 322, 106 S.Ct. 1078, 1085, 89 L.Ed.2d 251 (1986). Because we conclude that the evidence was sufficient as to each element, in subpart B we address Turner's specific challenges to the legal standard the district court employed. As discussed in part IV, Turner was entitled to a jury trial as to the new plaintiffs' claims; we, therefore, only review these challenges in the context of the original plaintiffs' claims.

A.

The plaintiffs claim that Turner failed to provide them with reasonable protection from prison violence in violation of the Eighth Amendment. The plaintiffs do not argue that Turner knew of specific threats to their safety.

Rather, they argue that Turner failed to ensure their protection from the general danger arising from a prison environment that both stimulated and condoned violence. This theory of liability creates substantial, but, as we shall see, not insurmountable obstacles to the plaintiffs' claims.

To prevail on their Eighth Amendment claim for damages brought under section 1983, the plaintiffs must prove three elements:[16] (1) a condition of confinement that inflicted unnecessary pain or suffering, *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981), (2) the defendant's "deliberate indifference" to that condition, *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321, 2327, 115 L.Ed.2d 271 (1991), and (3) causation, *Williams v. Bennett*, 689 F.2d 1370, 1389-90 (11th Cir.1982).[17] For our purposes, the Eighth Amendment defines the contours of the first two elements and section 1983 delimits the third.

1.

First, the condition must have inflicted unnecessary pain or suffering upon the prisoner. This objective standard "embodies 'broad and idealistic concepts of dignity,

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[16] Section 1983, upon which this action is based, also requires that the defendant act "under color of state law." 42 U.S.C. § 1983. This element is not at issue in this case.

[17] The Supreme Court recently confirmed that the first two elements of an Eighth Amendment claim, the "objective" and "subjective" elements, must both be satisfied. *See Hudson v. McMillian*, ___ U.S. ___, ___, 112 S.Ct. 995, 999-1000, 117 L.Ed.2d 156 (1992).

civilized standards, humanity, and decency . . . ,' " but must be balanced against competing penological goals. *Gamble*, 429 U.S. at 102, 97 S.Ct. at 290 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir.1968)). The evidence presented at trial of an unjustified constant and unreasonable exposure to violence at GCI, as described in part I.B., clearly satisfies this standard. *Zatler v. Wainwright*, 802 F.2d 397, 400 (11th Cir.1986); *Williams*, 689 F.2d at 1376; *see Wilson*, ___ U.S. at ___, 111 S.Ct. at 2326-27; *Jones v. Diamond*, 636 F.2d 1364, 1374 (5th Cir.) ("When prison officials have failed to control or separate prisoners who endanger the physical safety of other prisoners and the level of violence has become so high . . . it constitutes cruel and unusual punishment. . . . "), *cert. dismissed*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981), and *overruled on other grounds by International Woodworkers of Am. v. Champion Intern. Corp.*, 790 F.2d 1174 (5th Cir.1986);[18] *Gates v. Collier*, 501 F.2d 1291, 1308-10 (5th Cir.1974).

2.

Second, the plaintiffs must show the defendant's deliberate indifference to the condition. The Supreme Court recently held that the Eighth Amendment contains a subjective component: whether the defendant wantonly permitted the constitutionally infirm condition to persist. *Wilson*, ___ U.S. at ___, 111 S.Ct. at 2323; *see also Gamble*, 429 U.S. at 104, 97 S.Ct. at 291. In prison condition cases,

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[18] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

"deliberate indifference" constitutes wantonness. *Wilson*, ___ U.S. at ___, 111 S.Ct. at 2327.

To be deliberately indifferent, a prison official must knowingly or recklessly disregard an inmate's basic needs so that knowledge can be inferred. *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir.1985), *cert. denied*, 479 U.S. 816, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986). Because the Eighth Amendment requires a subjective standard, to demonstrate an official's deliberate indifference, a plaintiff must prove that the official possessed knowledge both of the infirm condition and of the means to cure that condition, "so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Duckworth*, 780 F.2d at 653. Thus, if an official attempts to remedy a constitutionally deficient prison condition, but fails in that endeavor, he cannot be deliberately indifferent unless he knows of, but disregards, an appropriate and sufficient alternative.[19]

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[19] The Seventh Circuit in *McGill v. Duckworth*, 944 F.2d 344 (7th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1265, 117 L.Ed.2d 493 (1992), noted a difference between "when [a state] acts *because of* [an] effect," in which case the state intends a consequence, and "when it acts *in spite of* an effect," in which case the state lacks the requisite intent. *Id.* at 344 (citing *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979)). If such a standard were applicable to Eighth Amendment claims, the burden upon plaintiffs would become even more formidable. Yet, the requisite intent for deliberate indifference is unlike that for demonstrating a legislature's discriminatory intent under equal protection jurisprudence, as in *Feeney*. The *McGill* court's approach apparently provides officials a safe refuge from liability, much like a bystander is provided at common law. By doing so, the *McGill* court overlooks the significance of an official's duty not to impose cruel and

In this case, the plaintiffs presented incident reports, internal staff reports, and reports by external investigators each supporting a finding that Turner knew that an unreasonable risk of violence existed at GCI and knew of alternative means that would have brought that risk to within constitutional norms.[20] For example, a January 30, 1980 Palm Beach County Grand Jury Presentment identified evidence of "lax security precautions," and recommended procedural changes in light of "accusations of drugs, alcohol, and other contraband, gambling, theft, confiscation, and payoffs among the inmates and personnel of GCI." Similarly, and external management review of GCI conducted from August 26 to 29, 1980, concluded that "[t]he assault trend, both inmate on inmate and

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unusual punishment upon prisoners – a duty firmly established in the Supreme Court's Eighth Amendment jurisprudence. A state – and similarly its officials – can be deliberately indifferent if it acts *in spite of* a condition violating the objective prong described above unless such actions are justified by countervailing penological objectives.

[20] Turner testified as to additional sources through which he gained knowledge of the conditions at GCI. These included monthly meetings with key staff members, attendance at monthly meetings of each department, regular meetings with prisoner organizations, and his general practice of wandering through the prison compound.

Turner argues that the district court relied on notice created through telephone conversations between Turner and Saunders' mother. *See LaMarca*, 662 F.Supp. at 696. These conversations arguably showed general indifference on Turners' part toward inmates. Yet, because the conversations occurred after the alleged incidents, they were not relevant to Turner's pre-assault knowledge of unsafe conditions at the prison and were only marginally relevant to his alleged indifference to prisoner safety at the time of the alleged incidents.

inmate on staff, from July 1979, through June 1980, has increased." Finally, Turner's July 16, 1981 letter to his superiors evidenced his knowledge of a lack of

> control of the operation of the institution. . . . Many of the officers that we have assigned to very sensitive security posts are so inexperienced or else have so little capability in this business that they simply do not realize the seriousness of dealing with the type of personnel that we are receiving.

The plaintiffs' evidence painted a dark picture of life at GCI; a picture that would be apparent to any knowledgeable observer, and certainly to an official in Turner's position.[21] An inference can be drawn from this evidence that Turner did know that GCI failed to provide inmates with reasonable protection from violence.

Mere knowledge of the infirm conditions persisting at GCI does not establish deliberate indifference. The plaintiffs must also demonstrate that, with knowledge of the infirm conditions, Turner knowingly or recklessly

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[21] In *Rizzo v. Goode*, 423 U.S. 362, 375-76, 96 S.Ct. 598, 606, 46 L.Ed.2d 561 (1976), the Supreme Court rejected a plaintiff's § 1983 claim based on pervasive unconstitutional police practices. "[T]he Court disapproved the imposition of liability for the officials' failure to act in the face of a statistical pattern of police misconduct absent proof that the supervisory defendants had *'direct* [] *responsibility* for the actions' of those police officers who had engaged in this misconduct." *Williams*, 689 F.2d at 1381 (quoting *Rizzo*, 423 U.S. at 375-76, 96 S.Ct. at 606). In this case, the trial court did not rely solely on statistical patterns. Moreover, Turner's supervisory role and the insular character of prison communities provided strong support for the court's conclusion that Turner must have known of these conditions.

declined to take actions that would have improved the conditions.

Turner points to evidence of his actions to improve safety conditions at GCI to illustrate his affirmative efforts to improve the conditions of the confinement there. Turner testified that he attempted to secure additional funds, make improvements to GCI's physical plant, expand recruitment efforts, and institute policies that would have reduced the risk of violence if his staff had followed them.[22] Turner argues that he was unable to ameliorate further the unsafe conditions at GCI; he did all he could within the budgetary constraints he faced, and, therefore, was not deliberately indifferent.

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[22] Turner generally improved GCI's physical plant, modernized the prison's infirmary, decreased staff overtime, increased the number of confinement cells, and made a significant effort to document incidents at GCI (an effort necessary to proper management and safety). He also appeared before state legislative committees, wrote letters to Secretary Wainwright of the Department of Corrections, and identified the problems at GCI in his monthly reports.

Turner also appears to have made substantial efforts to improve recruiting of staff, a critical problem for GCI during Turner's tenure as superintendent. He testified that he sought to increase salaries (and was minimally successful), acquired a van for staff car-pooling from more distant locations (reducing the staff's transportation expenses), appeared at high school career days, and set up a program with the Florida State Employment Service. To control contraband, he attempted to utilize marijuana-sniffing dogs, but this proved ineffective in light of the confusing effluvium at GCI. The evidence does not indicate whether Turner intended that these actions resolve GCI's problem with prisoner safety.

In rebuttal, the plaintiffs presented evidence (1) that Turner failed to ensure that his direct subordinates followed the policies he established, and (2) of specific, low-cost actions that Turner could have taken and that his successors successfully undertook. This evidence supports a finding that Turner knowingly "fail[ed] adequately to supervise correctional officers up to the lieutenant level[,] result[ing] in corruption and incompetence among the officers and a lack of reasonable protection of inmates." *LaMarca*, 662 F.Supp. at 665; *see Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir.1991) (suggesting that inadequate staffing may rise to deliberate indifference as to prisoner safety (citing *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir.1980, *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981)); *cf. Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir.1993) (en banc) ("It is simply not enough to say . . . that [the official] gave the issue a great deal of thought. The 'sufficiently culpable state of mind' necessary to find deliberate indifference has more meaning than that.").

Determining whether Turner otherwise lacked the means to correct GCI's failure adequately to protect inmates requires a more detailed analysis. In *Williams*, we held that an official "may not escape liability solely because of the legislature's failure to appropriate requested [and necessary] funds." 689 F.2d at 1387.[23] Where, as here, the lack of funds contributed to the condition, the plaintiffs must "demonstrate that a particular defendant [nevertheless] had the capability (authority

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[23] In *Wilson*, the Court declined to address the applicability of an insufficient funds defense. ___ U.S. at ___, 111 S.Ct. at 2327.

and means) to provide adequate security and did not do so." *Id.* at 1389.

To circumvent Turner's "insufficient funds defense," the plaintiffs presented evidence of Turner's capacity, within budgetary constraints, to improve prison safety. We agree with the district court that the plaintiffs' evidence supports the findings that Turner could have, but did not, take steps to minimize at least the following problems at GCI:

> (1) improper and inadequate staff training . . . , (2) a staff out of control who did not report rapes, assaults, and illegal activities up through the chain of command, (3) [Turner's] failure to supervise staff and administer measures which would "minimize the chance of error and maximize the full satisfaction of constitutional protection," in (i) not stationing officers to patrol throughout the dormitories, particularly at night, and leave the wicket cage, and in (ii) permitting the obscuring of vision of the officers in the wicket by allowing inmates to hang sheets . . . , (4) [Turner's] shocking failure to employ any standard procedure to investigate incidents of alleged rapes, [(5)] [Turner's] failure to provide inmate movement controls thus reducing the casual egress and ingress of aggressive assailant wolves within the open dormitories, and [(6)] [Turner's] failure to transfer know[n] assailants or inmates who should have been known to be assailants out of GCI.

LaMarca, 662 F.Supp. at 708 (citations omitted).

Consideration of such evidence comes perilously close to second-guessing the difficult choices that prison

officials must face and of improperly extending deliberate indifference standards to mere "inadvertence or error[s] in good faith." *Wilson*, ___ U.S. at ___, 111 S.Ct. at 2324 (citing *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986)). Nevertheless, such evidence is probative of the means available to Turner and must be considered. This evidence directly addresses the question of whether monetary restraints frustrated Turner's good faith efforts, or whether he knowingly or recklessly disregarded solutions within his means.[24] While much of the record indicates that Turner did make good faith efforts to resolve the dilemmas facing GCI,[25] the evidence does support the plaintiffs' position that Turner recklessly disregarded the necessary means to protect inmate safety.

3.

Third, section 1983 "requires proof of an affirmative causal connection between the actions taken by a particular person 'under color of state law' and the constitutional deprivation." *Williams*, 689 F.2d at 1380 (citing *Monell v. Department of Social Servs.*, 439 U.S. 658, 692, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978)); *Redman v. County*

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[24] The district court did not address this point, and, therefore, did not determine whether Turner knew of, or recklessly disregarded, the solution suggested by the plaintiffs. On remand, the district court must reconsider whether Turner was deliberately indifferent to prisoner safety at the time of each incident for which an award of money damages is sought.

[25] For example, Turner's July 16, 1981 letter suggests a deep concern for, and helplessness regarding, the state of affairs at GCI.

of San Diego, 942 F.2d 1435, 1439 (9th Cir.1991) (en banc) (requiring an act or omission causing the constitutional deprivation), *cert. denied*, ___ U.S. ___, 112 S.Ct. 972, 117 L.Ed.2d 137 (1992). Section 1983 thus focuses our inquiry on whether an official's acts or omissions were the cause – not merely a contributing factor – of the constitutionally infirm condition.

"A causal connection may be established by proving that the official was personally involved in the acts that resulted in the constitutional deprivation." *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir.1986). Because the analysis focuses on the defendant's conduct, the doctrine of *respondeat superior* does not apply. Whether a defendant actually controls, or fails properly to supervise a subordinate, however, may prove to be relevant inquiries. *See Rizzo*, 423 U.S. 375-76, 96 S.Ct. at 606.

If a plaintiff establishes a causal link between the defendant's acts or omissions and the infirm condition, the defendant is "precluded from contending that the unconstitutional condition was not at least a proximate cause of . . . injuries" that arose from that condition. *Williams*, 689 F.2d at 1389. This is not to say that a plaintiff need not show a causal link between the constitutionally infirm condition and the alleged injuries. Rather, the finding that a prison condition offends the Eighth Amendment presupposes the distinct likelihood that the harm threatened will result. The wrong in Eighth Amendment cases is the deliberate indifference to a constitutionally infirm condition; that wrong must, in turn, have been the proximate cause of the plaintiffs' injuries, here the injuries brought about by the assaults.

In *Doe v. Sullivan County*, 956 F.2d 545 (6th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 187, 121 L.Ed.2d 131 (1992), the Sixth Circuit addressed causation under section 1983 arising from allegations of "systematic deficiencies" in a prison's protection of inmates similar to those in the instant case. The plaintiff presented evidence of overcrowding, dark cells, insufficient staff, lack of mental and physical evaluations, and inadequate surveillance. *Id.* at 550. Additionally, a penological expert testifying for the plaintiff concluded that there was a pattern of violence among inmates at the prison and that because of the plaintiff's slight build and mental disability, prison officials should have placed him in protective custody. *Id.* at 549. In reviewing the sufficiency of the evidence to show causation, the Sixth Circuit concluded "that more is required than [a] naked assertion that the assault would not have occurred but for the offensive conditions. To hold otherwise would effectively transform the causality requirement from a substantive element of proof into one of pleading." *Id.* at 550. In this case, the plaintiffs presented evidence to support their allegations that Turner "was in a position to take steps that could have averted" the alleged unconstitutional condition at GCI, "but, through [deliberate] indifference, [he] failed to do so." *Williams*, 689 F.2d at 1384.

The plaintiffs presented evidence supporting five conditions of confinement that were under Turner's control and that together created an unconstitutional risk of violence at GCI: (1) a "prevalence of . . . weapons" at GCI, (2) the lack of adequate patrols, (3) the lack of adequate reporting procedures for rapes and assaults, (4) the presence of "obvious and rampant indicia of homosexual

activity," (5) a lack of supervision of officers leading to corruption and incompetence. *LaMarca*, 662 F.Supp. at 664-65. The evidence supports the plaintiffs' assertion that Turner could have brought GCI within constitutional norms through more diligent supervision of his officers, by establishing and enforcing rules and procedures to eliminate specific sources of danger to prisoners, and through low-cost modifications to GCI's physical plant. In particular, Turner could have taken significant steps to eliminate the highly permissive atmosphere at GCI both as to officers shirking their duties and as to prisoners engaging in extortion, harassment, sexual activity, and sexual and other assaults.

As we discussed in part II.A.2., the evidence strongly supports a finding that, even within the constraints he faced, Turner had the means substantially to improve prisoner safety at GCI. This evidence also supports findings that Turner knew that the actions he undertook would be insufficient to provide inmates with reasonable protection from violence, and that other means were available to him which he nevertheless disregarded. Such evidence provides the necessary causal link between Turner and the infirm conditions at GCI.

Finally, the evidence shows a link between the unconstitutional conditions and the plaintiffs' injuries. The record supports the district court's finding "that due to [their] very nature as acts of violence, the rapes that occurred are not isolated incidents of sexual conduct, but rather flow directly from the lawless prison conditions at GCI. . . . [These conditions created] the background and climate which . . . preordained homosexual rapes and other inmate assault[s]." *LaMarca*, 662 F.Supp. at 687. The

evidence thus permits a finding of a causal link between the objectively intolerable conditions at GCI and the plaintiffs' injuries.

B.

Having determined that the plaintiffs presented sufficient evidence to establish liability on their damages claims against Turner, we turn to Turner's specific challenges to the legal standard the district court employed in assessing liability. Turner contends that the district court clearly erred in its analysis of (1) his deliberate indifference to the constitutionally infirm injury producing conditions, and (2) causation. We disagree.[26]

1.

Turner challenges the district court's finding that he knew of several problems at GCI that contributed to the constitutionally infirm conditions.[27] He argues that

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[26] Turner has not challenged the district court's finding that GCI failed to provide inmates with reasonable protection from violence. We therefore assume that the plaintiffs satisfied the Eighth Amendment's objective component as to each incident for which money damages was sought.

[27] On appeal, Turner draws our attention to nine factors identified by the district court as contributing to the unconstitutional conditions at GCI: (1) a lack of weapons training, marginally indicating a more general failure by Turner to train his staff, (2) the staff's failure to report rapes, (3) the staff's failure to report other illegal activity, (4) the staff's failure regularly to patrol dorms, (5) the staff's failure to ensure maximum visibility in the dormitories, (6) the lack of standard procedures for investigating rapes, (7) Turner's failure to avail himself of outside

without this finding, the district court might not have concluded that he knew of the infirm conditions and thus that he had been deliberately indifferent to the plaintiffs' safety.[28]

Turner points to specific language in the district court's opinion indicating that the court applied a negligence standard to determine his knowledge of the infirm conditions and the problems that caused them. For instance, in its discussion of Turner's indifference to prisoner safety, the court stated that "[a] section 1983 plaintiff must prove either that the official knew or *should have known* that his action infringed a clearly established constitutional right of the plaintiff, regardless of the officials' subjective intent. . . . " *LaMarca*, 662 F.Supp. at 663 (emphasis added) (internal quotations and citations omitted); *see also id.* at 658, 678-79 (relying on knowledge "discernable to any prudent prison administrator"). In light of *Wilson*, which has clarified that a subjective standard must be applied to Eighth Amendment claims, the district court's resort to such an objective standard was erroneous.

The court also erred by inquiring as to Turner's knowledge during the "relevant time period of Plaintiffs'

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agencies for investigating rapes and assaults, (8) Turner's failure to establish inmate movement controls, and (9) Turner's failure to transfer problem inmates.

[28] This argument conflicts with Turner's earlier contention that he was not deliberately indifferent because he took affirmative steps to improve prisoner safety. Yet, Turner could not actively seek to remedy a situation of which he was unaware. Turner's earlier arguments thus indicate an awareness of the infirm conditions.

damage claims," instead of making a directed inquiry into Turner's knowledge at the time of each incident. *See, e.g., LaMarca*, 662 F.Supp. at 708-09 ("Plaintiffs' claims are not isolated incidents. They stem from a far ranging and serious failure of Defendant Turner to properly manage[] GCI."). The alleged assaults occurred over a three-year period, and, as one would expect, Turner's knowledge ripened during this period. The district court failed to determine properly whether Turner possessed the requisite knowledge at the time of each incident.

As we have already discussed, the evidence as a whole, and, in particular Turner's July 16, 1991 letter, provide strong support for the court's ultimate conclusion that Turner knew of the pervasively and obviously unsafe conditions at GCI. The district court, however, did not rely solely on such evidence. We therefore cannot conclude as a matter of law that Turner had a sufficient awareness of the infirm conditions to satisfy *Wilson*'s subjective standard. Thus, while sufficient evidence exists upon which to find knowledge of the conditions, *see supra* part II.A, the court must reconsider its findings as to whether Turner had knowledge of or recklessly disregarded the constitutionally infirm conditions at the time of each incident.

2.

Turner also challenges the court's findings as to causation, i.e., whether his deliberate indifference caused the alleged constitutionally infirm condition, and whether the condition caused the assaults. The district court incorrectly stated that an official must "accomplish[] what

[can] be accomplished within the limits of his authority." *LaMarca*, 662 F.Supp. at 664 (citing *Williams*, 689 F.2d at 1388). As our discussion of Turner's deliberate indifference and causation indicates, *see supra* parts II.A.2 & 3, merely showing that an official had the means to correct a constitutional infirmity will not suffice. For the plaintiffs to demonstrate the requisite causal nexus, Turner must not only have had the means to correct the alleged constitutional infirmities, but also must have at least recklessly disregarded the inadequacy of the approach he took, the availability of other approaches, and their capacity to provide a cure. As we have already noted, it is, after all, " 'obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause. . . . ' " *Wilson* ___ U.S. at ___, 11 S.Ct. at 2324 (quoting *Whitley*, 475 U.S at 319, 106 S.Ct. at 1084) (citations omitted; internal quotations omitted; emphasis omitted); *cf. Fernandez v. United States*, 941 F.2d 1488, 1494 (11th Cir.1991) ("To establish a valid eighth amendment claim, 'a prisoner must allege acts or omissions sufficiently harmful to evidence [the] deliberate indifference [of prison officials]. . . . ' " (quoting *Gamble*, 429 U.S at 106, 97 S.Ct. at 292)). This approach ensures that we do not question the direction taken by officials in performing the complex and arduous task of running prisons. *See Preiser v. Rodriguez*, 411 U.S. 475, 492, 93 S.Ct. 1827, 1837, 36 L.Ed.2d 439 (1973) ("Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems."). Thus, we must revisit our analysis of Turner's subjective intent to ensure that only

evidence probative of causation in the Eighth Amendment context will be considered.

The district court did not identify the potential solutions that Turner actually or recklessly disregarded. Additionally, the court's causation inquiry was not circumscribed by the knowledge Turner possessed at the time of each alleged assault, a particularly important consideration since the district court found that conditions slowly, but continuously, improved during Turner's tenure as superintendent. Instead, the court assumed that Turner actually knew, or should have known, of these measures. Thus, even though the plaintiffs' evidence supports a finding of causation, *see supra* part II.A.3, the court's finding that the solutions available to Turner were sufficient may have erroneously charged him with an Eighth Amendment duty he did not have. The court must, therefore, reconsider the issue of causation and determine whether Turner knowingly or recklessly disregarded any corrective measures. If he did, the court must then determine whether, taken as a whole, these measures would have eliminated the infirm conditions for which he was responsible.

III.

We now shift our focus from the retrospective analysis of the plaintiffs' damages claims against Turner to the prospective relief sought by the class of present and future inmates of GCI. Three challenges to the court's order granting injunctive relief merit discussion: (1) the conditions at GCI had improved, and, therefore, injunctive relief was no longer required, (2) Lambdin, GCI's

current superintendent, had not been deliberately indifferent to prisoner safety, and (3) the district court's equitable grant unnecessarily intruded upon GCI's management.

A.

First, Lambdin argues that because GCI reasonably protected inmates from violence at the time of trial, the court erred in granting injunctive relief. We disagree. Subsequent events, such as improvements in the allegedly infirm conditions of confinement, while potentially relevant, are not determinative. When a defendant corrects the alleged infirmity after suit has been filed, a court may nevertheless grant injunctive relief unless the defendant shows that absent an injunction, the institution would not return to its former, unconstitutionally deficient state. *Jones*, 636 F.2d at 1375; *Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs*, 622 F.2d 807, 822 (5th Cir.1980) (finding that "the defendant [must] demonstrate that there is no reasonable expectation that the wrong will be repeated" (internal quotations omitted)), *cert. denied*, 450 U.S. 964, 101 S.Ct. 1479, 67 L.Ed.2d 613 (1981). We have held that

> [j]urisdiction may abate if there is no reasonable expectation the alleged violations will recur and if intervening events have completely and irrevocably eradicated the effects of the alleged violations. To defeat jurisdiction on this basis, however, defendants must offer more than their mere profession that the conduct has ceased and will not be revived.

Hall v. Board of School Comm'rs, 656 F.2d 999, 1000-01 (5th Cir. Unit B 1981) (citations omitted). The burden is thus "a heavy one." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

The district court, in the damages phase of the case, found that GCI failed to provide inmates with reasonable protection from violence. On appeal, Lambdin has not challenged this determination, but has instead relied on GCI's elimination of the infirm conditions to defeat the court's grant of injunctive relief.[29] The district court, however, concluded that Lambdin had not taken sufficient steps to ensure that GCI's past wrongs would not be repeated. The record supports this finding. It was, therefore, appropriate for the court to consider granting the plaintiffs' request for injunctive relief.

B.

Second, relying on the court's observation that Lambdin "appears to be a dedicated public servant who is trying very hard to make GCI an efficient and effective correctional institution," Lambdin argues that the court erred in ordering injunctive relief. In essence, he asserts that the court should have focused on his deliberate indifference, instead of the institution's historical indifference. The Supreme Court in *Kentucky v. Graham*, 473

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[29] On remand, Turner may challenge the district court's findings as to the objective unreasonableness of conditions at GCI at the time of the incidents underlying the original plaintiffs' damages claims. We recognize that this does create a potential for inconsistent findings in the damages and injunctive phases of the case.

U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), explained the significance of suits against state officials in their official capacities:

> Official-capacity suits . . . "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity.

Id. at 165-66, 105 S.Ct. at 3105 (citations omitted); *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2311, 105 L.Ed.2d 45 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." (citing *Brandon v. Holt*, 469 US 464, 471, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985))); *Owens v. Fulton County*, 877 F.2d 947, 951 n. 5 (11th Cir.1989). Thus, while changes in circumstances may change the nature of, or necessity for, injunctive relief, substitution of Lambdin as the named official does not bar such relief. *See Graham*, 473 U.S. at 166 n. 11, 105 S.Ct. at 3105 n. 11.

C.

Third, Lambdin challenges the scope of the district court's order. We must therefore determine whether the relief granted by the court squares with the alleged harm. The court's order dealt with three conditions of confinement: (1) GCI's protection of inmates, (2) conditions in

protective confinement, and (3) counseling of rape victims. The later two conditions, although tangentially related to prisoner safety, required a separate constitutional foundation. We address each below.

1.

We have so far assumed, as the parties have, that at the time of the second trial (on the claim for injunctive relief), GCI provided inmates with reasonable, and constitutionally adequate, protection from violence. Although the district court did not reach this issue, we are satisfied, after reviewing the record, that this assumption is correct.

Absent an existing constitutional violation, the district court's power to grant equitable relief was limited to ensuring that GCI continued to provide inmates with adequate protection. *Cf. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S.1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971) ("[T]he nature of the violation determines the scope of the remedy.") While district courts have broad discretion to fashion equitable relief, such relief must target the existing wrong. *Milliken v. Bradley*, 433 U.S. 267, 282, 97 S.Ct. 2749, 2758, 53 L.Ed.2d 745 (1977) ("[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation. . . . "). Here, the wrong was the risk that GCI would once again disregard the safety of its inmates.

In *Jones*, we considered the appropriate form of relief when, during the pendency of the court's proceedings,

the defendants cured the constitutionally infirm conditions alleged by inmate-plaintiffs. We stated that

> Judges are neither correctional officers nor penologists. Even if we had the expertise to analyze the practical and theoretical implications of the conditions of incarceration, we would have no warrant to impose our views, for a legislature – state or federal – is not required by the Constitution to operate penal institutions in accordance with criminological doctrine or to employ only experts in their management. . . . Moreover, we are aware that we should not, "in the name of the Constitution, become . . . enmeshed in the minutiae of prison operations."

636 F.2d at 1368 (quoting *Bell v. Wolfish*, 441 U.S. 520, 562, 99 S.Ct. 1861, 1886, 60 L.Ed.2d 447 (1974)). In keeping with the mandate of *Bell v. Wolfish*, we prescribed only general constraints designed to ensure that the prison would continue to operate in a constitutional manner.

In this case, the district court ordered Lambdin to maintain policies requiring (1) that the dorms and confinement areas be regularly patrolled and that patrols have clear views of the relevant areas, (2) the use and maintenance of metal detectors, (3) regular shakedowns, and (4) the disciplining of prisoners found in possession of contraband. These aspects of the court's order, while not comprehensive, target GCI's potential to slacken its efforts to protect its inmates.

To effectuate its prescribed policies, however, the court also ordered Lambdin to discipline his guards, detailing the type of sanctions and the conditions under

which they should be employed. We find that this unnecessarily intrudes on GCI's operations. *See Bell*, 441 U.S. at 547, 99 S.Ct. at 1878; *Rhodes v. Chapman*, 452 U.S. 337, 351, 101 S.Ct. 2392, 2401, 69 L.Ed.2d 59 (1981). The court should have "accorded wide-ranging deference in the adoption and execution of policies and practices that in [the prison official's] judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547, 99 S.Ct. at 1878. It was sufficient that the court enjoined Lambdin to ensure that the specific policies were carried out. Going beyond this to restrict the methods by which Lambdin effectuated these policies was an inappropriate use of the court's equity powers.

2.

The district court's injunctive order also addressed conditions in protective confinement. The court determined that during Turner's tenure, conditions in protective confinement were punitive in nature. By the time of the second trial, however, this was no longer the case. The Court, therefore, should have limited its order to ensuring that the conditions continued to conform with the Eighth Amendment standards. Instead, the court fine-tuned the existing conditions by (1) eliminating double-bunking, (2) precluding stays in protective confinement in excess of thirty days, (3) requiring the transfer of inmates in protective confinement who could not be returned to the general prison population, and (4) ensuring that the lighting in protective confinement conforms

to American Correctional Association guidelines.[30] The conditions targeted here, whether taken singularly or together, do not constitute cruel and unusual punishment and do not ensure that the prior infirm conditions will not recur. *See Wilson*, ___ U.S. at ___, 111 S.Ct. at 2327 (Separate failures of prison administration designed to protect inmates "may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have mutually enforcing effect that produces the deprivation of single, identifiable human need. . . . "). We, therefore, vacate the district court's injunction and remand the claim for injunctive relief so that the court may determine whether an injunction is necessary to ensure the continuance of currently constitutionally adequate conditions in protective confinement.

3.

Finally, the district court ordered psychological counseling of rape victims. The court found that GCI unnecessarily and wantonly inflicted pain upon prisoners by failing to provide them with post-rape psychological or

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[30] The Supreme Court has rejected Eighth Amendment challenges to double-bunking. *See Bell*, 441 U.S at 542, 99 S.Ct. at 1875 (rejecting any "sort of 'one man, one cell' principle"). Similarly, the district court's order precluding long-duration stays in protective confinement, and requiring timely transfers of inmates who cannot return to protective confinement, does not address a constitutional violation. *See Meriwether v. Faulkner*, 821 F.2d 408, 415-16 (7th Cir.), *cert. denied*, 484 U.S. 935, 108 S.Ct. 311, 98 L.Ed.2d 269 (1987).

psychiatric counseling. This aspect of the court's injunction was based on independent findings of fact that inmates are systematically denied access to such treatment, *cf. Harris*, 941 F.2d at 1505, and that such denials constitute deliberate indifference to a serious medical need, *see Gamble*, 429 U.S. at 104, 97 S.Ct. at 291; *Greason v. Kemp*, 891 F.2d 829, 834 (11th Cir.1990). These findings are well supported by the record. The court enjoined Lambdin to (1) provide training to all prison guards in the handling of rape complaints, (2) require special training for the staff psychiatrist and the staff psychologist, and (3) "promulgate an official referral procedure for all rape victims to the resident psychiatrist or psychologist for evaluation." We affirm these aspects of the injunction.

IV.

A.

Turner appeals the district court's ruling that he waived his Seventh Amendment right to jury trial as to the new plaintiffs' claims.[31] *See* Fed.R.Civ.P. 38(b), (d). The right to "trial by jury is a vital and cherished right, integral in our judicial system," *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 258, 69 S.Ct. 1067, 1069, 93 L.Ed. 1347 (1949), and a waiver of this right must be meaningful, *In re Zweibon*, 565 F.2d 742, 746 (D.C.Cir.1977) (Rule 38 was not "intended to diminish" the constitutional right to a trial by jury in civil cases, "and should be

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[31] The Seventh Amendment preserves, "[i]n Suits at common law. . . . the right of trial by jury. . . . " U.S. Const. amend. VII.

interpreted, where possible, to avoid giving effect to dubious waivers of rights."). Moreover, "as the right of jury trial is fundamental, [we must] indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 811-12, 81 L.Ed. 1177 (1937); *Borgh v. Gentry*, 953 F.2d 1309, 1311 (11th Cir.1992) ("[A] court's discretion [to deny a jury trial] is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510, 79 S.Ct. 948, 956, 3 L.Ed.2d 988 (1959))). We therefore review the district court's denial of a jury trial with "the most exacting scrutiny." *City of Morgantown*, 337 U.S. at 258, 69 S.Ct. at 1070. Unless the error is harmless, we must reverse judgment founded upon an unconstitutional denial of a jury trial. *Western Elec. Co. v. Milgo Elec. Corp.*, 573 F.2d 255, 257 (5th Cir.), *cert. denied*, 439 U.S. 895, 99 S.Ct. 255, 58 L.Ed.2d 241 (1978).

The Federal Rules of Civil Procedure provide that "[t]he right to trial by jury as declared by the Seventh Amendment to the Constitution . . . shall be preserved to the parties inviolate." Fed.R.Civ.P. 38(a). A party may, however, waive this right by failing to make a timely demand upon the courts. Under Rule 38, as to "any issue triable of right by a jury," waiver occurs ten days after "service of the last pleading directed to such issue." Fed.R.Civ.P. 38(b), (d); *See Guajardo v. Estelle*, 580 F.2d 748, 752-53 (5th Cir.1978). Such waivers apply only to the issues raised by the pleadings; subsequent amendments to the pleadings can raise "new issues" for which the right to a jury remains.

In this case, Turner did not demand a jury trial within ten days of his answer to the first amended complaint. He therefore waived his right to jury trial as to issues raised in that complaint. He argues, however, that he did not waive his right to jury trial as to the new plaintiffs' claims.

The district court, in rejecting Turner's demand for a jury trial, concentrated on Rule 38's use of the term "issue," which the court noted refers to those issues "raised in the original complaint." *LaMarca,* 662 F.Supp. at 652; *Rosen v. Dick,* 639 F.2d 82, 94 (2d Cir.1980) ("[T]he term 'issue' means something more than the evidence offered and the legal theories pursued. . . . [One must ask whether] the ultimate issue for decision is different."). The court concluded that no new issues were raised by the amended pleadings and struck Turner's jury demand.

The district court's approach illustrates the difference between the jury's role in resolving specific factual issues, and the application of such determinations to legal theories. *Guajardo,* 580 F.2d at 753. New facts that "merely clarif[y] 'the same general issues' raised in the original complaint" do not create new issues of fact upon which to assert a jury demand. *Lanza v. Drexel & Co.,* 479 F.2d 1277, 1310 (2d Cir.1973) (en banc) (quoting *Moore v. United States,* 196 F.2d 906, 908 (5th Cir.1952)); *id.* (The "underlying facts and basic legal theory [must be] changed by the amendments" in order to create new issues.). Amendments to pleadings thus may contain new facts which do not create new issues triable by a jury. *Id.*

These basic principles for identifying new issues were developed in cases where all relevant parties were

before the trial court at the time of the initial waiver. In such cases, a trial court applies these principles to determine the extent of a demanding party's prior waiver. In this case, however, the second amended complaint added seven new plaintiffs permissively joined under Fed.R.Civ.P. 20(a).[32] Each new plaintiff asserted an individual claim for damages arising from a separate incident at GCI. Moreover, the incidents alleged by three of the new plaintiffs (Cobb, Durrance, and Aldred) had not occurred at the time Turner waived jury trial as to the issues raised by the first amended complaint. Turner asserts that waivers under Rule 38 do not apply in such circumstances. We agree.

The plaintiffs do not directly address whether the district court's approach of identifying new issues provides the proper analysis when newly joined parties raise unique claims. Instead, they tenaciously argue (as they successfully did below) that all issues raised in the second and third amended complaints arose from the same "general area" of dispute or involve the "same matrix of facts" identified in the first amended complaint. *See Lanza*, 479 F.2d at 1310. Thus, they contend that the second and third amended complaints do not raise new issues revitalizing Turner's right to jury trial.[33]

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[32] The original plaintiffs' motion for leave to file a second amended complaint states that the addition of the new plaintiffs was consistent with Fed.R.Civ.P. 15(a). Since the new plaintiffs' claims raise independent causes of action, however, Fed.R.Civ.P. 20(a) controlled the insertion of these parties into the suit.

[33] The plaintiffs point to, but do not discuss, three cases in which new plaintiffs were added after waiver, but, nevertheless, the right to a jury was not revived. *See Commonwealth of Penn. v.*

Underlying the plaintiffs' resistance to Turner's jury demand is their mistaken belief that this case involved only "one prison civil rights suit under 42 U.S.C. § 1983." This case involved eleven separate actions: ten independent damages actions and one class action for injunctive relief. Each of these actions raised distinct factual issues. Turner was not "put on notice [as to these claims] by the original round of pleadings in this case." *Cedars-Sinai Medical Ctr. v. Revlon, Inc.*, 111 F.R.D. 24, 30 (D.Del.1986). All he could have anticipated at the time of his waiver was that evidence of the incidents underlying the new plaintiffs' claims might be presented at trial. Even under its analysis, the district court erred by striking Turner's jury demand.[34]

Turner raises an alternative approach to analyzing his right to jury trial which determines which issues

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Sincavage, 439 F.2d 1133 (3rd Cir.1971); *Barr v. Arco Chem. Corp.*, 529 F.Supp. 1275 (S.D.Tex. 1982); *Ed Brawley, Inc. v. Gaffney*, 399 F.Supp. 115 (N.D.Cal.1975). These cases did not involve a jury demand by a defendant after the joinder of plaintiffs with distinct claims. Rather, each case involved a jury demand by an intervening plaintiff. *Sincavage*, 439 F.2d at 1134 (requiring plaintiff-intervenor to take case "in the status in which she found it"); *Barr*, 529 F.Supp. at 1276 ("new plaintiff merely reasserted rights alleged in the original complaint," and was joined to correct prior pleadings); *Ed Brawley*, 399 F.Supp. at 118 (same rights asserted by original and new plaintiffs). These cases suggest no justification for precluding Turner's jury demand.

[34] The new issues included, at least, (1) whether each assault actually occurred, (2) the damages stemming from such assault, (3) the protection afforded to inmates at the time of each assault, (4) Turner's deliberate indifference to the unconstitutional condition at the time of each assault, and (5) the causal nexus between his indifference and the condition.

must, on remand, be tried before a jury. He observes that if the new plaintiffs had brought separate suits, an effective waiver under Rule 38 in one suit would not extend to the others. Under the district court's approach, however, permissive joinder provides a means to bypass a party's right to jury trial, thus making this fundamental right contingent upon the procedural mechanism through which a claim comes before a trial court. When such processes are within the sole control of one side of a dispute – here the plaintiffs – and subject only to the discretion of the trial court, application of the Federal Rules cannot extirpate a party's constitutional right to jury trial.

In this case, three and one-half years after LaMarca filed his *pro se* complaint, and only two months before trial, Turner demanded a jury trial as to all issues raised in the new plaintiffs' claims. The plaintiffs stress these dates as indicative of the frivolousness of Turner's position. Yet, the plaintiffs created this issue by seeking to join the new plaintiffs in the heat of trial preparation, and then insisting that Turner relinquish his right to present his case to a jury. Turner objected to the joinder of the new plaintiffs and stressed his intent to demand a jury trial on all issues raised by the new claims. Nevertheless, the court permitted joinder of the new claimants, and did so without preserving Turner's right to a jury trial. Turner's right to a jury trial thus fell victim to the trial court's discretionary decision to permit joinder of the new claimants.[35] Notwithstanding any common thread

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[35] *Richland v. Crandall*, 259 F.Supp. 274 (S.D.N.Y.1966), illustrates another procedural rule, consolidation, which, if

that may have existed between the original and amended complaints, even if to a "sickening proportion," *LaMarca*, 662 F.Supp. at 653, we cannot sanction such a result. We

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improperly applied in the Rule 38 context, can be used by bypass a party's Seventh Amendment right. In *Richland*, shareholders brought four suits derivatively, individually, and as class actions, against 20 defendants (officers, directors, and corporations) for violations of the Securities Exchange Act. Before consolidation, at least one of the 20 defendants had answered three of the four complaints. *Id.* at 281 & n. 9. The plaintiffs filed a demand for a jury trial within 10 days of service of the answers to the consolidated complaint by some of the defendants. The defendants in *Richland* argued that by not making a timely demand for a jury trial after the early answers to the original complaints, the plaintiffs waived their right to a jury as to the *issues* presented in each of the four original complaints. The court, however, observed that the "[d]efendants ignore[d] the fact that the defendants who answered some of the [original complaints . . . constitute[d] only 3 out of the 20 parties named as defendants in one or more of the underlying complaints and in the consolidated complaint, and that the issue was not joined as to the other 17 defendants until [the answers to the consolidated complaint had been filed]." *Id.* at 28.

The distinction noted by the *Richland* court is critical. Even though all claims involved the same transaction and there was substantial similarity of issues, the plaintiffs' Rule 38 jury demand was timely as to the claims by the 17 defendants who had not answered the original complaints.

We find the *Richland* court's analysis persuasive. The only relevant distinction between *Richland* and this case is the procedural mechanism through which the independent claims were joined; in *Richland* separate suits were filed and then consolidated; in the instant case, plaintiffs sought and obtained leave to join new parties with independent claims.

hold, therefore, that Turner was entitled to a jury trial as to the new plaintiffs' claims.[36]

B.

Turner argues that his right to jury trial as to the new plaintiffs' claims trumps his waiver as to common issues raised by the original plaintiffs' claims,[37] *see In re Kaiser Steel Corp.*, 911 F.2d 380, 388 (10th Cir.1990) (holding, in case with multiple parties, that waiver of common issue does not occur until ten days following the last pleading by any party), and therefore that he is entitled to a jury as to all claims. Turner concedes, however, that he knowingly waived his right to a jury as to the original plaintiffs' claims. Without a constitutional underpinning upon which to rest, Turner must demonstrate that the district court erred in its application of Rule 38 and that he was harmed by this error. *Cf. id.*, (holding amendments to pleadings do not revive the right to jury trial as to issues already framed). Because he has not done so, Turner's initial waiver as to the original plaintiffs' claims remains effective.

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[36] The plaintiffs' assertion that the original class action suit for injunctive relief incorporated the potential claims of the new plaintiffs is patently meritless.

[37] Consistent with his other arguments, Turner maintains that the original and new plaintiffs' claims have few, and perhaps only one, common issue: "whether the prison conditions during the time frame relevant to their claims were in violation of the 8th and 14th Amendments."

V.

Turner next appeals (1) the district court's refusal to continue the December 2, 1985 trial; (2) the court's refusal following the trial to consider, as part of the trial record, several depositions taken during and shortly after the trial; and (3) the court's refusal to reopen the record of the trial to receive some additional evidence Turner obtained while the first appeal (of the damages awards) was pending in this court. We review these rulings for abuse of discretion. *Connecticut Gen. Life Ins. Co. v. Breslin*, 332 F.2d 928, 932 (5th Cir.1964).

As indicated earlier, after the plaintiffs filed their second amended complaint (which added seven plaintiffs to the case) on August 26, 1985, the defendants moved for a continuance of the trial which had been set for November 4, 1985. The district court granted their motion on November 10, continuing the trial until December 2. The defendants wanted more time for discovery and to prepare for trial; we cannot say, however, that the court abused its discretion in giving them the extra time allotted. *See Edward Leasing Corp. v. Uhlig & Assocs.*, 785 F.2d 877, 881-82 (11th Cir.1986); *Menendez v. Perishable Distribs., Inc.*, 763 F.2d 1374, 1379 (11th Cir.1985).[38]

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[38] We reach this result even though the record indicates that the plaintiffs erroneously represented to the court that they were "ready for trial." In fact, their own expert witnesses were unprepared at the time of the December 2, 1985 trial. Dr. Swanson, for instance, admitted on cross-examination that he bypassed potentially relevant sources of information because of severe time pressures. The district court postponed consideration of the injunction claim because Dr. Swanson was not fully prepared.

The defendants renewed their motion for a continuance on November 13, stating that they would not be able to complete their discovery by the scheduled trial date. According to the defendants, they needed to depose several witnesses who had been identified by the new plaintiffs when the defendants took their depositions. Whatever may have been the defendants' need for a continuance at that time, the need increased when, as the trial was about to begin, the district court gave the plaintiffs leave to file their third amended complaint adding Billy Joe Harper's damages claim.

Believing that Harper's claim raised no new issues, and thus created no need for additional discovery, the district court refused to grant a continuance. The court's belief was unfounded; Harper's claim raised several new issues requiring discovery. *See supra* note 34. After the trial began, the magistrate judge apparently had second thoughts about the defendants' need for a continuance; he permitted them to take discovery depositions both during and after the trial with the understanding that

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The plaintiffs' counsel further skewed the court's perception of the defendants' discovery problems by representing to the court that certain witnesses identified by the new plaintiffs in their depositions were not "actual" witnesses whom Turner might require time to contact. Plaintiffs' counsel stated that "I [have] never seen a deposition taken, particularly prisoners, [in an] inmate setting, where a deponent does not offer under skilled examination, such as defendants' counsel, a name of somebody that was a potential witness to an incident, a name of an alleged perpetrator, a name of somebody in the next cell who may have heard or seen [something]." (It seems apparent that Turner's counsel placed more stock in the credibility of the prisoners' stories than plaintiffs' counsel did.)

these depositions could be made a part of the trial record at a later date. The defendants accepted this arrangement, evidently believing that it would eliminate any prejudice the denial of the continuance otherwise might have occasioned. Given this acceptance by the defendants, we find that the defendants effectively waived their objection to the December 2 trial date.

The trial of the damages claims against Turner ended on December 16, 1985. That day, the magistrate judge instructed counsel to file their proposed findings of fact and conclusions of law by December 23, and scheduled oral argument for December 27. Oral argument was held that day, and the magistrate judge indicated in his report to the district court that he would find for the plaintiffs. On January 8, 1986, the plaintiffs moved the magistrate judge to exclude from the record seven depositions that defendants had taken with the permission of the plaintiffs and the court. Plaintiffs' counsel argued that the depositions should be excluded because the defendants had denied counsel access to the deponents' prison records and thus a meaningful opportunity to cross-examine the witnesses. The magistrate judge granted the motion, and the district court, after considering the magistrate judge's report and recommendation, affirmed.

In his brief to us, Turner does not explain how the exclusion of the seven depositions from the record prejudiced his case. Accordingly, Turner has shown no abuse of discretion.

Finally, while the district court's disposition of the plaintiffs' damages claims was before us on appeal,

Turner's counsel searched for evidence to rebut Dr. Swanson's testimony as to the conditions prevailing at GCI during Turner's tenure.[39]They uncovered documentary evidence, that Turner represents, undermines the court's findings.[40] After we dismissed the first appeal and returned the case to the district court, Turner moved the court to "reopen" the record of the damages trial and consider the new evidence. The court, believing that it lacked jurisdiction to do so, refused.[41]

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[39] The court's extensive reliance on Dr. Swanson's testimony demonstrates the importance of this witness. Yet, Dr. Swanson did not begin his investigation until after October 4, 1985, and did not complete his interviews with the plaintiffs until December 1, 1985, the day before the damages trial began.

[40] Turner described this evidence, in part, as more than 100 investigations were undertaken from 1980-84 . . . in respect to sexual assaults, non-sexual assaults and batteries, possession of weapons, possession of drugs or alcohol and introduction of contraband; they reflect that, in virtually all instances, the Palm Beach County Sheriff's office was involved in the investigations; that prosecutions were undertaken; that, in respect to alleged sexual assault, rape kit tests were administered when appropriate; that there was an established procedure for investigation and handling of such claims.

[41] The court stated that

> [i]f this Court's order was incorrect earlier in that respect in that we denied motions for continuance, and I think there was perhaps more than one of these, why, it seems to me . . . that I may not have jurisdiction at this time since an appeal has been taken. [Counsel for Turner] asserts that we still do, and perhaps he is right, but it seems to me it is better to go ahead and stick with that earlier ruling, and let the appellate court review that point as well as this order which I am now making denying the motion. . . .

The district court plainly had the authority to reopen the record and to consider the new evidence. The court had such authority at least until, on October 6, 1990, when it entered the final judgment. *See* Fed.R.Civ.Pro. 59; S.D.Fla.Magis.R. 4(b) (A district court is free to "receive further evidence, recall witnesses, or recommit the matter to the Magistrate Judge with instructions."); *La Fever, Inc. v. All-Star Ins. Corp.*, 571 F.2d 1367, 1368 (5th Cir.1978). Prior to the entry of judgment (and the denial of the defendants' motion for a new trial), the court had the power to revisit the entire case.

Since we remand the damages claims of the new plaintiffs for trial before a jury, the district court's action in refusing to consider the new evidence only affects the claims brought by LaMarca, Saunders, and Johnson. Because the court might have considered Turner's new evidence, had it thought it had the power to do so, we instruct the court to consider Turner's proffer. We intimate no view, however, as to whether the court should accept it and reopen the proceedings as to these three plaintiffs.

VI.

Turner retained the right to trial by jury as to the new plaintiffs' claims. We therefore vacate the money judgments for Durrance, Cobb, Bronson, Aldred, and Harper, and remand their claims for a new trial. We remand the judgments favoring LaMarca, Johnson, and Saunders for reconsideration in light of our discussions in parts II and V. We remand the court's grant of injunctive relief for

further proceedings consistent with part III of our opinion. Finally, in light of these holdings, we must vacate the court's attorneys' fees award.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-5009

District Court No. 82-8196-CIV

ANTHONY LaMARCA, MARTIN SAUNDERS and EDWIN JOHNSON, individually and on behalf of all others similarly situated, and DAVID ALDRED, STEVE H. BRONSON, JR., EDDIE COBB, RON DURRANCE, WAYNE EPPRECHT, MICHAEL GORDON and BILLY JOE HARPER, individually,

Plaintiffs-Appellees,

versus

R. V. TURNER, individually in his former capacity as Superintendent of Glades Correctional Institution, CHESTER LAMBDIN, in his official capacity as Superintendent of Glades Correctional Institution,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

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Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and WILLIAMS*, Senior Circuit Judge.

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* Honorable Jerre S. Williams, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

JUDGMENT

(Filed July 7, 1993)

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the money judgments of the said District Court in this cause be and the same are hereby VACATED and REMANDED to said District Court for a new trial as to plaintiffs Durrance, Cobb, Bronson, Aldred and Harper; the judgments favoring plaintiffs LaMarca, Johnson and Saunders are hereby REMANDED for reconsideration in accordance with part II and V of this Court's opinion; the District Court's grant of injunctive relief as to defendant Lambdin is hereby REMANDED for further proceedings consistent with Part III of this Court's opinion; the award of attorneys' fees is hereby VACATED, in accordance with the opinion of this Court.

Entered: July 7, 1993
For the Court: Miguel J. Cortez, Clerk

By: Karleen Illegible
Deputy Clerk

ISSUED AS MANDATE: NOV 10 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-8196-Civ-PAINE

ANTHONY LA MARCA,
et al.,

v.

R. V. TURNER, et al.

_____/

ORDER

(Filed
Nov. 25, 1985)

For reasons recited in open Court, it was ORDERED as follows:

1. Plaintiffs' Motion to file a Third Amended Complaint is GRANTED *nunc pro tunc* November 14, 1985. The Court makes no present ruling, however, regarding the recoverability of attorneys' fees or the presence of the State of Florida as a Defendant for that purpose.

2. Defendants' Jury-Demand is DENIED. The Motion for further Continuance of Trial is DENIED, without prejudice. Upon their Motion to Strike, the Court RESERVES. The parties are cautioned that the Court expects that any expert witness will have been made available for deposition before that expert's testimony is tendered to the Court. If there is any issue upon which Defendants require a brief adjournment *after* the court has begun the trial next week, their right to adjournment can be further considered at that time.

ORDERED in Miami, Florida, November 25, 1985.

/s/ Peter L. Nimkoff
PETER L. NIMKOFF
UNITED STATES
MAGISTRATE

Copies:
Walter M. MegInnis, Esq.
David M. Lipman, Esq.
William M. Amlong, Esq.
Michael B. Davis, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-8196-CIV-PAINE

ANTHONY LAMARCA, MARTIN SAUNDERS, and EDWIN JOHNSON, individually and on behalf of all others similarly situated, and DAVID ALDRED, STEVE H. BRONSON, JR., EDDIE COBB, RON DURRANCE, WAYNE EPPRECHT, MICHAEL GORDON, and BILLY JOE HARPER,

Plaintiffs,

v.

R. V. TURNER, Individually, and RANDALL MUSIC, as Superintendent of Glades Correctional Institution,

Defendants.
_____/

ORDER

This cause is before the Court on the Appeal from Magistrate's Order and Petition For Emergency Hearing filed by the Defendants R. V. TURNER, RANDALL MUSIC and the State of Florida. The Court has also received the Plaintiff's Response to Defendants' Appeal from Magistrate's Order and Petition for Emergency Hearing.

The Court has read and considered these submissions of counsel with respect to the ruling made by Magistrate Nimkoff on November 25, 1985. It appears that the ruling

is not clearly erroneous. The Magistrate adequately considered the issues and his ruling is therefore AFFIRMED. Accordingly, it is

ORDERED and ADJUDGED that the Appeal from Magistrate's Order and Petition for Emergency Hearing is DENIED.

DONE and ORDERED this 2nd day of December, 1985, in Miami, Florida.

/s/ James C. Paine
UNITED STATES
DISTRICT JUDGE
JAMES C. PAINE

cc: All counsel of record

Anthony LaMARCA, Martin Saunders, and Edwin Johnson, individually and on behalf of all others similarly situated, and David Aldred, Steve H. Bronson, Jr., Eddie Cobb, Ron Durrance, Wayne Epprecht, Michael Gordon, and Billy Joe Harper, individually, Plaintiffs,

v.

R. V. TURNER, individually in his former official capacity as Superintendent of Glades Correctional Institution, Chester Lambdin, in his official capacity as Superintendent of Glades Correctional Institution, and the State of Florida, Defendants.

No. 82-8196-Civ.

United States District Court,

S.D. Florida.

June 4, 1987.

David M. Lipman and Robert E. Weisberg, of Lipman & Weisberg, Miami, Fla., and William Amlong of Hall & Amlong, Fort Lauderdale, Fla., for plaintiffs.

Walter M. Meginniss, Asst. Atty. Gen., Tallahassee, Fla., and Michael B. Davis, of Davis, Critton, Hoy & Diamond, West Palm Beach, Fla., for defendants.

ORDER ON REPORT AND RECOMMENDATION OF MAGISTRATE

PAINE, District Judge.

This cause comes before the court on the report and recommendation of the Magistrate (DE 128), defendants'

amended response and objections (DE 155), and plaintiffs' reply (DE 170). The court has studied these submissions and has reviewed the voluminous transcripts, exhibits, and other materials in the case file as well as the relevant authorities. Now being fully advised, the court renders the following memorandum and order.

I.

BACKGROUND

This class action for damages and injunctive relief was brought by inmates who claim that their federal constitutional rights were violated when they were gang raped or otherwise assaulted while incarcerated at the Glades Correctional Institution (GCI), a state prison in Belle Glade, Florida. The procedural history of the case is set out at length by the Magistrate. Briefly, this litigation was commenced on May 14, 1982 with the handwritten pro se complaint of Anthony LaMarca, who alleged that he was subjected to ongoing physical violence and harassment by other GCI inmates because he refused to participate in homosexual activity and that prison officials failed to act to alleviate the situation (DE 1). As the lawsuit continued, counsel was obtained and the complaint was amended several times (DE 23, 62, 93, 129, 131). On April 13, 1984, the undersigned district judge ordered that for purposes of injunctive relief the case proceed as a class action defined as those persons within the Florida prison system who are or will be incarcerated at GCI (DE 47).

The third amended complaint contains claims for damages by ten inmates. Named plaintiffs LaMarca, Saunders and Johnson also seek equitable remedies on behalf of the class. Defendant Turner is sued in his individual capacity as former superintendent of GCI. Defendant Lambdin, the current superintendent, is sued solely in his official capacity for purposes of injunctive and equitable relief (DE 129). The State of Florida is a defendant for purposes of attorneys' fees and expenses.

The district court referred the case to United States Magistrate Peter Nimkoff for a report and recommendation pursuant to Magistrate Rule 1(f) of the Local Rules of the Southern District of Florida. The Magistrate conducted two weeks of evidentiary hearings, reviewed deposition testimony and numerous exhibits, and heard oral argument. The Magistrate then filed a 135-page report and recommendation containing findings of fact and conclusions of law (DE 128) which found Turner liable to the ten named plaintiffs in the aggregate amount of $201,500 and recommended the creation of two committees to assist the court in formulating specific injunctive relief.

Defendants filed extensive objections to the Magistrate's report in accordance with Local Magistrate Rule 4(b) (DE 155). Defendants dispute the Magistrate's failure to grant a continuance, to grant a jury trial, and to recuse himself from the proceedings, and also lodge numerous objections to specific findings of fact and conclusions of law. Plaintiffs submitted an equally extensive reply (DE 170).

II.

STANDARD OF REVIEW

The court's review of the Magistrate's findings and recommendations is governed by a de novo standard:

> A District Judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate. The District Judge, however, need conduct a new hearing only in his discretion or where required by law, and may consider the record developed before the Magistrate, making his own determination of the basis of that record. The District Judge may also receive further evidence, recall witnesses, or recommit the matter to the Magistrate with instructions.

Magistrate Rule 4(b), Local Rules of the Southern District of Florida; *accord* 28 U.S.C. § 636(b)(1) (1982).

The Supreme Court has held that, in providing for a de novo "determination" rather than a de novo hearing, "Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a Magistrate's proposed findings and recommendations." *United States v. Raddatz*, 447 U.S. 667, 676, 100 S.Ct. 2406, 2413, 65 L.Ed.2d 424 (1980). The former Fifth Circuit has held that, in situations involving the constitutional rights of a *criminal defendant*, a district court should not enter an order inconsistent with the Magistrate's credibility determinations without personally hearing the live testimony of the witnesses whose testimony is determinative. *Louis v. Blackburn*, 630 F.2d

1105, 1109 (5th Cir.1980).[1] Although the *Louis* court expressly limited its holding to criminal cases, *see id.* n. 3, the exercise of sound judicial discretion compels this court to extend substantial deference to the Magistrate's credibility choices absent counterveiling considerations. In a criminal case which preceded *Louis*, the Fifth Circuit stated:

> In our view it would be a rare case in which a district judge could resolve credibility choices contrary to the recommendations of the magistrate without himself having had an opportunity to see and hear the witnesses testify. Certainly, in such a rare case there should be found in the transcript an articulable basis for rejecting the magistrate's original resolution of credibility and that basis should be articulated by the district judge.

United States v. Marshall, 609 F.2d 152, 155 (5th Cir.1980).

III.

FAILURE TO GRANT JURY TRIAL

Defendants first object to the Magistrate's failure to grant a jury trial. The Magistrate found that defendants waived that right by failing to make a demand within ten days of November 2, 1983, when they filed an answer to the first amended complaint (DE 23, 41). Defendants first demanded a jury trial on November 8, 1985, over two

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[1] Decisions of the former Fifth Circuit filed prior to October 1, 1981 constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

years later, in response to the second amended complaint (DE 62, 69, 83). Following the Magistrate's denial of a jury trial (DE 105), defendants filed an emergency appeal with the district court (DE 104), which the undersigned denied (DE 112).

Defendants again argue that the second and third amended complaints introduced new issues into the lawsuit which merited a jury trial and that therefore their demand was timely. As the Magistrate correctly concluded, the right to jury trial is waived by a failure to make a demand within ten days of the "last pleading directed to such issue." Fed.R.Civ.P. 38(b). If the original pleadings effectively waive jury trial, the right cannot be revived by amending the original pleadings. *Walton v. Eaton Corp.*, 563 F.2d 66, 71 (3d Cir.1977). A jury trial may be demanded, however, for any "new issues" in the amended pleadings. Amendments not introducing new issues do not give rise to a demand for jury trial. *Guajardo v. Estelle*, 580 F.2d 748, 753 (5th Cir.1978).[2]

What constitutes a "new issue" is the bone of contention. The court's review of the law on this subject has yielded less than clear results. The former Fifth Circuit has said that "[t]he term 'new issues' has been interpreted to mean new issues of fact and not new theories of recovery." *Id.* at 753. Notwithstanding, not every new fact question has been held to give rise to a jury trial. For

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[2] Although Fed.R.Civ.P. 39(b) permits a court in its discretion to grant a jury trial after the period for a timely demand has run, defendants insist that they were entitled to a jury trial as of right and that therefore a Rule 39(b) analysis is inappropriate (DE 155, at 5).

example, in *Lanza v. Drexel & Co.*, 479 F.2d 1277 (2d Cir.1973) (en banc), a securities case, the court held that a claim for punitive damages and an allegation of willfulness were not new issues within the meaning of Rule 38:

> The willfulness and falsity as of a particular date *merely clarified "the same general issues" raised in the original complaint. Moore v. United States,* 196 F.2d 906, 908 (5th Cir.1952). Kircher had been put on notice of *the underlying facts and basic legal theory* – fraud – upon which plaintiffs sought relief, and *the character of the suit* was in no way changed by the amendments.

Id. at 1310 (emphasis added). One district court has articulated the following standard:

> The test to be employed by a court in ruling on a motion to strike a jury demand is whether the "new issues" alleged in the amendments *"touch . . . the same general issues"* raised by the original pleadings, *Roth v. Hyer,* 142 F.2d 227, 228 (5th Cir.1944), or whether the issues contained in the amended complaints *"were in any material way different* from those presented by the original [complaint]." *Connecticut General Life Insurance Co. v. Breslin,* 332 F.2d 928, 931 (5th Cir.1964).

Reading & Bates Construction Co. v. Baker Energy Resources Corp., 96 F.R.D. 564, 565 (S.D.Tex.1983) (emphasis added).

In this case, the second and third amended complaints introduced claims for damages by seven new plaintiffs. As defendants contend, each of these claims requires proof as to whether the alleged incidents occurred, whether the evidence establishes a causal connection with defendants' conduct, and whether damages

have been sustained. All of these questions raise "new" factual issues in the plainest sense of the word.

The peculiar circumstances of this case, however, suggest a contrary result. First, the record of the evidentiary hearings conducted by the Magistrate provides the court with 20/20 hindsight on the nature and materiality of the new factual issues. Second, a class action posture *requires* that the plaintiffs raise common questions of fact. *See* Fed.R.Civ.P. 23(a). Of particular relevance is the testimony of the named plaintiffs and of Dr. Richard M. Swanson, plaintiffs' expert witness in the field of correctional psychology. Considered as a whole, this evidence shows that plaintiffs' claims possess a factual congruity of sickening proportion. Their stories are strikingly similar, reflecting common experiences of harassment, threats, attack, official indifference, and resulting damage. The similarity of the factual questions is particularly apparent in the court's analysis of the causal connection between Turner's acts or omissions and plaintiffs' claims. *See, infra* at 681-682.

Thus, the issues raised by the seven new plaintiffs in the second amended complaint "touch . . . the same general issues" raised in the first amended complaint, *Roth v. Hyer,* 142 F.2d 227, 228 (5th Cir.1944), and are not materially different from the original issues, *see Connecticut General Life Insurance Co. v. Breslin,* 332 F.2d 928, 931 (5th Cir.1964); *see also Reading & Bates,* 96 F.R.D. at 565. The first amended complaint put defendants "on notice of the underlying facts and basic legal theory . . . upon which plaintiffs sought relief, and the character of the suit was in no way changed by the amendments." *Lanza,* 479 F.2d at 1310. Having failed timely to demand a jury

trial in response to the first amended complaint, defendants effectively waived their right to such a trial, and their objection is overruled.

IV.

FAILURE TO GRANT CONTINUANCE

Defendants next object to the Magistrate's failure to grant a continuance of the evidentiary hearings. This court has previously denied defendants' emergency appeal of the Magistrate's ruling (DE 104, 112).

Orders concerning the conduct of a trial, such as continuances, "are peculiarly within the jurisdiction of the trial court" and "will not be disturbed except upon a showing of abuse of discretion, and then only upon a showing that such abuse of discretion resulted in substantial harm to the parties seeking relief." *Edward Leasing Corp. v. Uhlig & Associates, Inc.*, 785 F.2d 877, 881-82 (11th Cir.1986).

Defendants principally assert that they were not prepared to defend against the damage claims because circumstances forced them to depose the seven new plaintiffs as well as plaintiffs' expert witnesses at the last minute. Further, defendants contend that these depositions revealed the names of new witnesses with knowledge of plaintiffs' claims but defendants had no opportunity to depose them.

The court is not persuaded that these circumstances justify a continuance. Defendants had already been granted one continuance from November 4, 1985 to a special setting on December 2, 1985. In that order the

Magistrate pointed out that defendants had had notice of the claims of the seven new plaintiffs at least since September 1 (DE 80). While it is true that discovery continued after the evidentiary hearings had begun, such a schedule does not appear to have dampened the energy and enthusiasm of competent counsel for both sides. Defendants were able to depose the seven new plaintiffs on November 13-15. Defendants do not explain, however, why this accelerated discovery schedule precluded them from deposing the newly-revealed witnesses before or after the commencement of trial on December 2, particularly considering that these new witnesses appear to be prisoners in defendants' custody. Defendants' assertion that they were unprepared to try this case, moreover, is belied by their effective crossexamination of plaintiffs' witnesses. Most important, defendants have demonstrated no actual prejudice. Accordingly, defendants' objection to the Magistrate's failure to continue the trial is overruled.

V.

FAILURE OF MAGISTRATE TO ENTER RECUSAL

During the testimony of Dr. Swanson, defendants first became aware that the Magistrate had visited GCI in the early stages of this litigation. Judge Nimkoff told counsel that in 1982 he had conducted an informal hearing of LaMarca's claim, as was often his custom in prisoner cases. Also present at the unrecorded proceeding were Joe Belitsky of the Attorney General's Office, representing the State, and GCI Assistant Superintendent Arline. LaMarca related to the court his concern for other

inmates who had been abused. Belitsky and Arline assured the Magistrate that a full investigation would take place. No such inquiry ever occurred, and Turner testified that he was unaware that these assurances were made to the court (DE 128, at 30-31). At trial defendants requested Judge Nimkoff to recuse himself, but the Magistrate denied that he would become a witness in the suit and accordingly refused the request.

A judicial officer is required to disqualify himself in a proceeding in which he has personal knowledge of disputed evidentiary facts concerning the proceeding. ABA Code of Judicial Conduct Canon 3(C)(1)(a) and (d)(iv); 28 U.S.C. § 455 (1982). Defendants argue that the Magistrate relied upon these events as evidence establishing either Turner's knowledge of alleged conditions at GCI or his failure to act on those conditions after he he [sic] was put on notice.

As defendants point out, the 1982 proceedings conducted at GCI were nonrecord, and no witness testified concerning the Magistrate's recollection of the events. Notwithstanding, knowledge acquired by a judge while he performs judicial duties does not constitute grounds for disqualification. *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). Where it is alleged that a judge has personal knowledge of disputed evidentiary facts concerning a proceeding such that he should recuse himself pursuant to 28 U.S.C. § 455, the information or knowledge must stem from an *extrajudicial* source to warrant disqualification. *United States v. Coven*, 662 F.2d 162, 168 (2d Cir.1981), *cert. denied*, 456 U.S. 916, 102 S.Ct. 1771, 72 L.Ed.2d 176 (1982). Judge Nimkoff's 1982 visit to GCI was undisputedly conducted

as part of the instant proceeding and occurred in the presence of counsel for the State. *See United States v. State of Washington*, 459 F.Supp. 1020, 1093-97 (W.D.Wash.1978), *aff'd*, 645 F.2d 749 (9th Cir.1981). Defendants, moreover, conceivably could have called Belitsky or Arline to testify to their memory of the proceeding.

Defendants finally argue that the Magistrate was inclined to rely on the 1982 hearing as evidence tending to establish notice to Turner or Turner's failure to act. The transcripts disclose that the Magistrate asked questions of several witnesses regarding that hearing. In his report and recommendation, however, the Magistrate states that those events serve "merely to underscore Plaintiffs' position that GCI, under the Turner administration, was an institution not under the control of that Defendant" (DE 128, at 31). Thus, the Magistrate did not accord those events with dispositive weight. *Cf. State of Washington*, 459 F.Supp. at 1095. In any event, disregarding the account of the 1982 hearing, the record contains more than enough evidence to support the Magistrate's findings and conclusions regarding Turner's control of GCI. The objection is overruled.

VI.

OBJECTIONS TO FINDINGS OF FACT

The court next will address in turn each of defendants' objections to the Magistrate's findings of fact and will analyze their significance to the overall disposition of the case. The numbers preceding each paragraph correspond to the paragraph numbering in the report and recommendation.

¶ 31. As plaintiffs concede, defendants' objection should be sustained. Turner was superintendent of GCI from mid-1976 to his retirement on July 31, 1984.

¶ 32. The racial breakdown of the GCI inmate population in 1985 is somewhat relevant to the issue of injunctive relief. The Magistrate's finding that approximately sixty percent of the population was Black and the remainder White or Hispanic is generally supported by the evidence which concededly was not the most competent proof. Although the documentary evidence contains no support for the conclusion that the figure for Whites included Hispanics, there was testimony to that effect. Objection overruled.

¶ 33. Although defendants are correct that Music estimated the Hispanic population at seven percent (Music, DE 160, at 133), the evidence supports the inference that that percentage may have been higher at times. Defendants also contest the definition of "close custody" prisoners; however, the Magistrate did not define the term. Objection sustained in part and overruled in part; the Magistrate's finding is modified accordingly.

¶ 36. Defendants protest the Magistrate's overall characterization of factors present at GCI such as "wholesale manufacture of prison wine," "regular screenings of sexually explicit videotapes," and "maintenance of an ill-assorted guard corps whose members the inmates perceived as regularly trafficking in contraband, extortion and neglect." Defendants admit that instances of these factors appear in the record but far less frequently than the Magistrate implied. The record supports findings that prison wine was prevalent at GCI, that sexually-explicit

films were shown, and that many of the guards were perceived as corrupt or at least neglectful. Although the Magistrate's language is somewhat hyperbolic, the objection is overruled.

¶ 38-39. Defendants argue that the Magistrate implied that Turner was aware of *all* of the conditions at GCI relating to plaintiffs' claims and that two letters Turner wrote to Louie L. Wainwright, secretary of the Florida Department of Corrections (DOC), constitute admissions of GCI's unsafeness. It is apparent from the letters in evidence, however, that Turner's comments must be viewed in the context of his reporting a staffing shortage to his superior. Objection overruled.

Defendants make much of the relevance to this litigation of the accreditation of prisons and GCI in particular by the American Correctional Association. The Magistrate found that the GCI accreditation had "virtually no significance" to this lawsuit because accredited prisons have been found unconstitutional by courts. Having considered the GCI accreditation along with the remainder of the evidence, the undersigned district court finds it of marginal relevance in this case. Objection overruled.

¶ 40. On January 30, 1980, the Palm Beach County Grand Jury issued a presentment regarding conditions at GCI (Pltf.ex. 4). Although the investigation was apparently provoked by shortages in meat supply, other security issues were addressed. Defendants' objection to the report's admissibility in evidence on the ground of hearsay is overruled pursuant to Fed.R.Evid. 803(8)(C) and is also overruled on the basis of relevance because the report is germane at least to the question of notice to Turner.

Defendants again complain about the Magistrate's use of the phrase "a free flow of contraband." The grand jury heard testimony of lax security at GCI as well as "many allegations and accusations of drugs, alcohol, and other contraband, gambling, theft, confiscation, and pay-offs among the inmates and personnel of GCI." The report stated that alcohol use and its manufacture was apparently "prevalent." Pltf.ex. 4, at 6. That such contraband was freely flowing at GCI is a reasonable construction of the grand jury's findings, and the objection is overruled.

¶ 42. On August 26-29, 1980, the DOC Office of the Inspector General issued a report on its management review of GCI (pltf.ex. 4). Among other things, the report noted a serious lack of supervision on the compound due to staffing shortages. The Magistrate simply cited this portion of the report and did not seem to hold Turner personally responsible for staff shortages. Accordingly, the objection is overruled.

¶ 44. Defendants dispute the magistrate's finding of low morale among GCI staff. The district court believes the record contains sufficient evidence to support this finding. This evidence includes an employee questionnaire which reflected that staff members felt that on-job training and the number of available staff were inadequate as well as the various witnesses' perception of staff apathy. Objection overruled.

¶ 45. The Office of the Inspection General issued a second GCI management report approximately three years later, on September 19-21, 1983 (pltf.ex. 6). The management report supports the Magistrate's finding of

some laxity in security, which included improper control and supervision of inmate movement from one location to another and inadequate staffing of the perimeter posts (*id.* at 8-9). Objection overruled.

¶¶ 46-50. The Magistrate found that the use of excessive force by Lieutenant William Barrett when he was acting chief correctional officer at GCI was relevant to Turner's management of GCI. In brief, Barrett was summoned from a local festival in Belle Glade to the prison after a fight broke out in a dormitory. Barrett was accompanied by Sergeant Rickey Hayes and Lieutenant L.A. Peters, GCI's internal inspector. All three had been drinking. Barrett and Hayes had their faces made up like clowns. Although the incident had been largely quelled, Barrett took a loaded shotgun into the compound and used it to beat several inmates in the back of the head.

As plaintiffs emphasize, the Barrett incident is relevant not as a showing of improper use of force but as an illustration of Turner's reaction to the situation. The incident report of the Office of the Inspector General states that on the night of the incident Turner advised Barrett to go home and rest and that Turner did not feel the situation warranted notification of a prison inspector (pltf.ex. 9, at 5). Defendants are correct to add that Turner eventually notified the inspector general, who sent a team to GCI within three days of the incident (Swanson, DE 117, at 213-14). Swanson criticized Turner for not immediately suspending Barrett and taking away his gun and badge rather than merely telling him to go home and rest. Significantly, defendants do not object to the Magistrate's finding at ¶ 49 that Barrett remained functioning as a

correctional officer for at least a full week after the incident. It is clear that the Magistrate did not attribute undue weight to the Barrett incident. Objection overruled.

The Magistrate also related Swanson's testimony concerning the transcript of Turner's interview with one of Barrett's victims (pltf.ex. 9, subex. 13). The Magistrate quoted Swanson's testimony that the inmate's reporting of wine-drinking among the prisoners did not appear to surprise Turner. Contrary to defendants' assertion, the district court does not believe that the Magistrate found that Turner "failed to register appropriate outrage" at this revelation. The Magistrate simply quoted Swanson's opinion in a footnote and did not comment on it in any way. Objection overruled.

¶¶ 51-52. Defendants also challenge as irrelevant the magistrate's findings regarding the investigation[3] and eventual dismissal and arrest of GCI correctional officer Clarence Dixon. As defendants note, Turner did testify that, although the investigation was hindered by several obstacles, he ordered it to continue. Turner's persistence, however, does not negate the Magistrate's finding that if Dixon's employment application had been properly screened he probably would not have been hired at all. Objection overruled.

¶ 53. Defendants again protest the Magistrate's use of the phrase "wholesale staff corruption." The Barrett

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[3] The investigation occurred in mid-1984 rather than 1974, a probable typographical error in the report and recommendation.

and Dixon reports and the testimony of alleged inmate-enforcer Larry Pryor obviously do not in themselves impugn the integrity, of the entire GCI security staff. Barrett, however, was one of GCI's top-ranked security officers. Further, the testimony of the inmate-witnesses discloses the perception of extensive staff corruption. Objection overruled.

¶ 56. The Magistrate agreed with Swanson's conclusion that the GCI staff or administration took little or no effort to control the extensive contraband at the prison. Defendants complain that the Magistrate ignored their evidence of substantial measures to control the flow of contraband during Turner's regime. Both sides have done a heroic job of providing citations to the evidence supporting their respective positions. The district court has considered all the evidence as well as the possible biases of the witnesses. The record as a whole supports the Magistrate's conclusion that little or no effort was taken to control illicit activity at GCI, resulting in readily available contraband. Objection overruled.

¶¶ 57-58. The Magistrate found that evidence of several incidents involving use of firearms tended to show inadequate staff training. Defendants claim that the Magistrate exaggerated the significance of these occurrences and that the GCI staff was in fact well-trained. The district court finds that the firearms incidents bear somewhat on the issue of staff training. Objection overruled.

¶ 59. Defendants' objection to the finding of low moral among staff is overruled for the reasons stated in *supra* ¶ 44.

The district court agrees with defendants' assertion that Turner is not solely to blame for high staff turnover and vacancies. As plaintiffs and defendants note, the staff turnover and vacancy rates declined in 1982 and continued to decline through 1984. The relevancy of these observations, however, is not critical to the resolution of this case, because six of the ten individual plaintiffs were raped or assaulted after the turnover and vacancy rates had declined in 1983 and 1984. The Magistrate's findings are modified in accordance with the district court's observations in this paragraph.

¶ 61. Defendants take issue with the finding that the individual plaintiff's claims are directly related to the lack of staff supervision due to Turner's failure to station the officers properly. The objection is overruled for the reasons stated in *infra* ¶¶ 62 and 63.

¶ 62. During the Turner administration, GCI inmates were in the habit of hanging sheets, towels, clothes, and personal lockers from the bunk beds. These obstructions obscured activity in the bunks from the view of the officer stationed in the cage or "wicket" at the front of each dorm. The showers at the back of the dormitories were obscured from the officers' view by these obstructions and also by double-bunking the middle row of beds. Defendants point to testimony that an officer stationed in the wicket could not see into parts of the shower even if these obstacles were removed. This does not change the fact that visibility was greatly improved with the removal of these obstructions in one of the dormitories under one of Turner's successors, Superintendent Randall Music. Objection overruled.

¶ 63. Although the officers were supposed to be on constant patrol of the dorms, the Magistrate found that this did not occur. The Magistrate's finding that routine patrol did not in fact take place is supported by the weight of the evidence, particularly the testimony that gang rapes in the showers or beds endured for fifteen to forty minutes. Objection overruled.

The Magistrate also found that Turner could recall no action taken against an officer for failure to patrol the dormitories. Turner actually testified that such action may have been taken but that he could not recall a specific instance.[4] Objection overruled.

¶ 64. Defendants take issue with the Magistrate's finding that GCI's chief investigator, Lieutenant Peters, testified that GCI had no standard operating procedure for investigating rapes (Peters, DE 162, at 444). Peters later testified to a procedure he had used to investigate a rape (*id.* at 464-65). From this testimony defendants allege that the Magistrate misrepresented the evidence. The court disagrees. Peters stated that no formal procedure in

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[4] Mr. Lipman: During your tenure, Mr. Turner, were any officers ever suspended or disciplined for failure to walk the areas of the dormitory outside of their wicket during their duty hours?

Mr. Turner: I'm less sure of that one, Mr. Lipman. There probably could have been some disciplinary action taken concerning officers not properly performing those types of duties.

There certainly could have been, yes, sir.

Mr. Lipman: Can you recite one specific instance where that occurred, sir?

Mr. Turner: No, sir, I cannot.

Turner, DE 164 at 732-22.

fact existed and later recounted his own methodology. Peters testified, as defendants note, that no procedure existed for line officers to report rapes directly to him, the prison investigator, but that line officers were supposed to pass on the information to their superiors. The individual plaintiffs' stories, which the Magistrate found credible, demonstrate that the passing of rape reports to superior officers did not produce competent or thorough investigations of those reports. Objection overruled.

¶ 65. DOC Inspector General Brierton testified that, in a prison rape investigation, at a minimum (1) medical evidence should be secured, (2) a full victim statement should be taken, and (3) the matter should be referred to a local prosecutor. These steps were not followed at GCI with respect to the individual plaintiffs. Defendants question whether the individual plaintiffs were actually raped and, if they were, whether the rapes were reported. Again, the Magistrate found credible plaintiffs' accounts of their rapes and the ensuing events. The district court sees no reason to doubt this finding, and the objection is overruled.

¶ 66. Both Turner and Peters specifically testified to only one prosecution for a rape at GCI. Peters remembered that it occurred in 1984. Although it is true that internal GCI statistical reports note five sexual assaults from 1980-84 (pltf.ex. 31), no incident reports regarding these attacks were introduced. The Magistrate's finding is so modified.

¶ 71. The Magistrate found that various factors, considered in combination, should have made it apparent to a prudent administrator that rapes were occurring, and

that, considering this knowledge, the failure to promulgate and adhere to the most rudimentary investigative and preventative procedures constitutes a deliberate indifference toward inmate security. The objection is overruled for the reasons stated in *infra* ¶¶ 72 and 73 and elsewhere in this memorandum and order.

¶ 72. The Magistrate found that the background of contraband, violence, and other illegal activity at GCI was compatible with the existence of violent sexual assaults. Defendants' objection that contraband was not free-flowing is overruled for reasons stated previously. Defendants' further objection that there is no connection between contraband and rape is belied by the plaintiffs' testimony evidencing the presence of weapons, drugs, and alcohol when they were raped. Objection overruled.

¶ 73. The Magistrate found that the disproportionate numbers of White inmates who received protective confinement should have put Turner on notice that these inmates felt in danger in the population. As defendants note, inmates may request protective confinement for reasons unrelated to fears for their safety. The district court makes two observations. First, if protective confinement houses twenty Whites to one Black in a population where Blacks outnumber Whites (pltf.ex. 6), a prudent administrator should at least have inquired why this was the case. Second, the evidence as a whole supports the inference that Whites who requested protective confinement did so out of fear of sexual or other assault. Again, a prudent administrator would have investigated. Objection overruled.

¶ 75. Defendants criticize the Magistrate's finding that conditions in protective confinement were "punitive" because certain physical problems such as lighting, ventilation, and overcrowding were out of Turner's fiscal control. Those conditions, however, comprised only part of the reason that protective confinement was punitive. For example, the cells were infested with waste and vermin, inmates were harassed by inmates in nearby disciplinary confinement and the compound, no exercise was afforded, only three brief showers a week were allowed, and canteen and often library privileges were lost. Objection overruled.

¶ 76. The fact that some inmates elected to remain in protective confinement for months was found to be evidence that those inmates experienced high anxiety in the compound. Overcrowded conditions in confinement supports an inference of a high inmate demand for protection. Defendants state only that other reasons could have contributed to the overcrowding, such as increase in inmate population, the nationwide rise in number of inmates in protective confinement, and inclusion of disciplinary and administrative confinement detainees. The Magistrate's finding is modified accordingly.

¶ 77. An experience repeated over and over in the testimony is the "wolfing"[5] and cat-calling by Black inmates to White inmates upon the arrival of the latter

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[5] "Wolf" is a slang term for a violent, coercive homosexual or for a particularly assaultive inmate.

group at GCI. Contrary to defendants' assertion, the Magistrate found only that Swanson testified that the corroboration of this experience by inmates unknown to each other and presently incarcerated in different institutions enhances the probability of its occurrence. Objection overruled.

¶ 78. The Magistrate found other indicia of sexual activity at GCI such as sheets hung from bunk beds, inmates moaning in their beds, and the showing of pornographic movies in a trailer where cries and moans were heard. Defendants object that reasons other than sexual activity existed for these occurrences and that there was no evidence that Turner knew of these phenomena. Such reasoning does not comport with the totality of the evidence including the inmate testimony that cries, moans, and screams were frequently heard emanating from the showers and from bunks concealed by sheets.

Further, defendants' protest that "a superintendent with all of his other responsibilities cannot screen each movie shown in the prison" is almost disingenuous. Uncontradicted evidence shows that sexually-explicit videotapes – with graphic depictions of intercourse – were regularly shown in a trailer on the compound, that these movies were unsupervised, and that sounds consistent with human sexual activity could be heard from the trailer. Several witnesses provided more lurid accounts of the scene inside the trailer itself. Plaintiffs' expert witnesses rendered their opinion that such films are inappropriate for a prison audience. Defense witness Brierton acknowledged that a different school of thought exists which holds that adult movies may be appropriate for adult prison audiences. Brierton, however, was adamant

that group events such as movies should *always* be supervised.

Defendants also point to the lack of evidence that Turner saw the hanging sheets, heard the cries, moans, and screams suggestive of sexual activity, or saw or selected the videotapes. A prudent administrator, however, should have been aware of these occurrences,[6] which the evidence shows to have been a prevalent and unmistakable part of life at GCI. Objection overruled.

¶ 79. The Magistrate found that some rapes were reported and that this should have signalled a problem to a prudent administrator. There is no reason to question the finding that rapes were reported to GCI officers. That these reports never made their way to Turner or to the prison investigator, considering the totality of the evidence, shows not Turner's exculpatory ignorance but rather his liability. Objection overruled.

¶ 81. Objection overruled for the reasons stated in *supra* ¶ 64.

¶ 82. The record contains no evidence that the rapes, which the Magistrate found to have occurred, were even minimally investigated. Defendants' objection is overruled for the reasons set forth in *supra* ¶¶ 64 and 79.

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[6] A former superintendent, Brierton testified that, although he did not personally select the movies, he discovered that inappropriate films were being shown when he stopped by the prison one night to see what the movie was (Brierton, DE 185, at 103).

¶ 83. The objection regarding rape prosecutions is overruled for the reasons stated in *supra* ¶ 66. The objection regarding weapons prosecutions is sustained as follows: the last sentence of the Magistrate's finding is deleted and replaced with the following: "There was no evidence that during Turner's administration a State prosecution was initiated for any weapons possessed by any inmate at GCI (Peters)."

¶ 84. The Magistrate found that during Turner's administration inmates bent on violence "roamed the compound with impunity." This finding is supported by the evidence that during Turner's reign inmates were free to wander the compound and dormitories other than the one to which they were assigned. The procedure whereby inmates need passes to move about the compound was instituted by a successor superintendent, Randall Music (Music, DE 160, at 146). Objection overruled.

The Magistrate further found that Turner refused to seek assistance from federal and state prosecutors and investigators to cope with the crimes committed on the compound. The record, however, contains some evidence of outside prosecutions initiated by Turner. The evidence does fairly show that outside state and federal criminal justice remedies were grossly underutilized during Turner's administration considering the crime-ridden atmosphere at GCI. The Magistrate's finding is modified accordingly.

¶ 86. The Magistrate found that the rapes of plaintiffs Aldred, Saunders, and Harper were reported to prison authorities, and the record contains no articulable reason for the district court to disregard this credibility

determination. This finding supports an inference that the rapes were never investigated at least partially due to the lack of an established procedure for reporting rapes to the prison investigator. Objection overruled.

¶ 87. The Magistrate found that Turner also failed to avail himself of or underutilized other possible investigative arms of the government such as the State Attorney General's Office, State Attorney's Office, and the Federal Bureau of Investigation. Whether or not these agencies could have assisted in improving the conditions at GCI, the record does not show that Turner requested assistance from other agencies, on a consistent or persistent basis, in order to alleviate GCI's problems. Defendants also note that there was no evidence that GCI's internal inspectors were unwilling or unable to investigate matters brought to their attention. These assertions ring hollow considering that, because of inadequate reporting procedures, many grave matters were never brought to their attention. Objection overruled.

¶ 89. The district court does not doubt the evidence cited by defendants that sometimes inmates were disciplined for being in an area in which they were not authorized to be. This proof, however, does little to mitigate the testimony which shows that inmate movement about the prison was inadequately controlled. *See, e.g., supra* ¶ 84. Objection overruled.

¶ 92. The objections are overruled for reasons previously addressed.

¶ 93. The Magistrate found that, even though parts of the dormitories were concealed from the view of an officer stationed in the wicket, "Turner never initiated

any administrative policy that officers patrol the dormitory on a regular basis" (DE 128, at 45). As defendants note, Turner did testify that posted orders required officers to patrol (Turner, DE 164, at 643). The weight of the evidence, notwithstanding, shows that the guards did not regularly patrol. The Magistrate's finding is so modified.

¶ 94. Succeeding superintendent Music was able to increase visibility by single-bunking the middle row of beds in one of the dormitories. Defendants argue that this modification was not cost-free, because $7,000 was expended for new lockers (Music, DE 160, at 141-42). The district court is unable to determine from the record whether new lockers were an essential element of the single-bunking or simply an added security measure for inmate property. Even if the $7,000 was a necessary expenditure, there is no significant evidence that Turner possessed or tried to obtain funds for that purpose. Objection overruled.

¶ 96-97. The Magistrate compared Turner's practice in managing the transfer out of GCI of problem inmates with that of successors Jones and Music. "Problem inmates" includes both aggressive inmate "wolves" and especially vulnerable inmates. There was evidence that Turner often achieved the difficult goal of transferring problem inmates out of GCI. Successor superintendent Jones transferred out forty to forty-five inmates in less than three months. Music transferred five a month over a six-month period. Defendants point to instances where Turner moved seven inmates on one occasion and twelve on another, although his monthly average of such transfers is not in evidence. There is other compelling proof,

however, that Turner was not zealous enough in transferring problem inmates: for example, Peters' admission, found credible by the Magistrate, that Turner did not view "wolves" as problem inmates; the chronicles concerning "wolves" Larry Pryor, Willie Dock, and Levi Fisher (DE 128, at 42-44); and the length of time the vulnerable plaintiffs were effectively forced to endure protective confinement before transfers took place. In the district court's view, the record shows that Turner could have exercised much more diligence in attempting to transfer problem inmates from GCI and that this failure constitutes evidence of deliberate or callous indifference to inmate safety. Objections overruled.

¶¶ 98-100. Defendants challenge the Magistrate's findings regarding inmate-wolves Pryor, Dock, and Fisher with minor discrepancies in the evidence. The Magistrate's findings are ultimately grounded in credibility determinations which the district court sees no reason to disturb. Objection overruled.

¶ 101. The objections are overruled for the reasons set forth at length in *supra* ¶ 78.

¶ 103. The Magistrate's analysis of the relationship between financial feasibility and the constitutional obligations of a prison superintendent comports with the prevailing law in the Eleventh Circuit (see *infra* at 38-39). Objection overruled.

¶ 105. The Magistrate's detailed specific measures which were inexpensive or cost-free, which were ignored or rejected by Turner, which were within his control, and which would have minimized or eliminated the likelihood of rapes and other assaults at GCI.

(i) Defendants claim that there was no evidence that Turner failed to discipline staff for failure to patrol the dorms, that staff in fact failed to patrol, or that Turner was made aware of any such failure. To the contrary, the district court can discern no significant evidence that the staff did patrol the dorms or that Turner disciplined staff for not patrolling. Further, there is no evidence explaining why Turner was *not* aware of this failure. Objection overruled.

(ii) The record reflects extensive contraband at GCI which was often provided or at least tolerated by Turner's staff, prevalent extortion activities by inmates which were not redressed by officers who were made aware of it, several instances of extortion activities by staff, and the tolerance of obvious consensual and non-consensual sexual activity by inmates. Each of these matters is addressed elsewhere in this memorandum and order and in the report and recommendation. Turner's overall laxity in managing and controlling his staff can be inferred from the prevalence and apparent obviousness of these conditions and from the absence of substantial evidence of disciplinary action directed to staff. Objection overruled.

(iii) The weight of the evidence supports the finding that during the Turner administration it was common practice for inmates to hang sheets and other objects from their bunks, thereby obstructing visibility in the dormitories. The inference is inescapable that a prudent administrator *would* have been aware of this problem. Objection overruled.

(iv) The district court has previously addressed the lack of adequate procedures for the reporting and investigation of rapes (supra ¶¶ 64-66). Objection overruled.

(v) Defendants' arguments have been rejected elsewhere (*supra* ¶¶ 37, 66), and the objections are overruled.

(vi) These assertions also have been rejected previously (*supra* ¶ 84). The objection is overruled.

(vii) The court has already addressed Turner's lack of zeal at transferring problem inmates (*supra* ¶¶ 96-100). Objection overruled.

¶ 108. Swanson utilized various methodologies to evaluate plaintiffs' accounts of their rapes. Defendants' objection appears to be a semantical one and is overruled.

¶ 109. The Magistrate found the expert opinion testimony of Dr. Caddy to be credible, and the district court does not question this finding. Objection overruled.

¶ 111. The Magistrate's credibility finding will not be overturned. Objection overruled.

¶ 118. The Magistrate's essential finding that the atmosphere of undeterred violence at GCI was conducive to acts of rape is supported by the weight of the evidence. Objection overruled.

¶ 121. The record does not support defendants' assertion that rectal examinations were actually used at GCI upon the reporting of a rape. Objection overruled.

¶¶ 122-195. The gravamen of defendants' objections turn on credibility determinations which the district court finds no reason to disturb. The objections are overruled.

¶¶ 196-199. The district court finds persuasive and supported by the evidence the Magistrate's observations on the overall integrity of plaintiffs' case. Objection overruled.

VII.

OBJECTIONS TO CONCLUSIONS OF LAW

Defendants' objections to the Magistrate's conclusions of law reflect a general agreement with the prevailing legal standards but dispute the application of the facts to those standards. In particular, defendants argue with the Magistrate's conclusion that plaintiffs have put forth sufficient proof of violation of their civil rights.

As the Magistrate concluded, the following legal standards apply. A prisoner has a right to be protected from the constant threat of violence and from sexual assault. When prison officials have failed to control or segregate prisoners who endanger the physical safety of other prisoners, resulting in a high level of violence, it constitutes cruel and unusual punishment. *Jones v. Diamond*, 636 F.2d 1364, 1373-74 (5th Cir.) (en banc), *cert. dismissed*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981); *see also Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (eighth amendment ban on cruel and unusual punishment made applicable to states by fourteenth amendment due process clause).

To hold a prison official liable in a civil rights action under 42 U.S.C. § 1983 (1982) based on cruel and unusual punishment, plaintiffs must show that the official's conduct constitutes an intentional or callous indifference to

the prisoner's right to reasonable protection from violence. *Wiliams [sic] v. Bennett*, 689 F.2d 1370, 1380-81 (11th Cir.1982), *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983). Plaintiffs must prove deliberate indifference on the part of the defendant official rather than simple negligence. Section 1983 further requires "proof of an affirmative causal connection between the actions taken by a particular person 'under color of state law' and the constitutional deprivation." *id.* at 1380. Where the defendants hold supervisory positions, vicarious liability will not suffice. *See Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (municipality not vicariously liable for acts of employees absent proof that execution of official policy inflicts injury). Supervisory defendants may be held liable if they have direct responsibility for the actions of the employees who engage in misconduct. *Rizzo v. Goode*, 423 U.S. 362, 375-76, 96 S.Ct. 598, 606, 46 L.Ed.2d 561 (1976). the Eleventh Circuit has stated that "the inquiry into causation must be a directed one, focusing on the duties and responsibilities of each of the individual defendants whose acts or omissions are alleged to have resulted in a constitutional deprivation." *Williams*, 689 F.2d at 1381.

The district court first examines whether Turner's conduct rose to a level of intentional or callous indifference to the plaintiffs' right to "reasonable protection from violence." *Id.* at 1380. The former Fifth Circuit elaborated on the elements of this requirement of intent in *Gullatte v. Potts*, 654 F.2d 1007, 1012 (5th Cir.1981). A section 1983 plaintiff seeking to sue prison officials must prove *either* that "the official knew or should have known

that his action infringed a clearly established constitutional right of the plaintiff," *Douthit v. Jones*, 619 F.2d 527, 534 (5th Cir.1980), regardless of the officials' subjective intent, *Bogard v. Cook*, 586 F.2d 399, 411 (5th Cir.1978), *cert. denied*, 444 U.S. 883, 100 S.Ct. 173, 62 L.Ed.2d 113 (1979), *or* that the "official either actually intended to do harm to the plaintiff, or took an action which, although not intended to do harm, was so likely to produce injury that the harm can be characterized as substantially certain to result," *id.* at 412.

The Magistrate found that Turner knew or should have known that his acts or omissions infringed plaintiffs' constitutional right to reasonable safety. Evidence that Turner *knew* of serious security problems included official documents such as Turner's letters to Wainwright, the 1980 grand jury presentment, the management reports of the DOC inspector general, the Barrett and Dixon incidents of staff corruption, and knowledge from various sources of the prevalence of contraband. The Magistrate further found that a prudent administrator *should have known* of widespread extortion activities by inmates often in collusion with officers and wide-spread rape and physical assaults by inmates on inmates (*see supra* ¶¶ 77-78). The extensive findings of fact cited by the Magistrate provide adequate support for his conclusion that Turner's conduct constituted callous indifference to plaintiffs' right to reasonable protection from violence. Thus, plaintiffs have satisfied the objective test of *Bogard*, that Turner knew or should have known that his actions violated a clearly defined constitutional right, as well as *Bogard's* subjective test, that Turner took an action which was so likely to produce injury that the

harm can be characterized as substantially certain to result.

A defendant cannot have the requisite intent for callous indifference if full compliance with constitutional norms is beyond his control and if he can show that he accomplished what could be accomplished within the limits of his authority. *Williams*, 689 F.2d at 1388. Over defendants' persistent protest that Turner's means were limited, the Magistrate identified administrative measures within Turner's control which imposed little or no financial limitation. These include measures Turner could have taken to identify and remedy his staff's failings at weapons training, the reporting of rapes, assaults, and other illegal activities through the chain of command, patrolling of the dormitories, and ensuring maximum visibility in the dormitories. Turner also could have implemented a standard operating procedure for investigation of rapes and assaults, availed himself of outside agencies in that regard, established inmate movement controls, and intensified his efforts to transfer particularly aggressive or vulnerable inmates from GCI. The fact that succeeding superintendents Jones and Music were able to achieve or at least take preliminary steps toward these goals attests to their feasibility. Thus, the district court is convinced that the means to satisfy constitutional minimums were within Turner's control. Accordingly, the court overrules the objection to the Magistrate's conclusion that plaintiffs failed to prove callous indifference.[7]

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[7] The Magistrate alternatively found section 1983 liability based on Turner's breach of a duty imposed by state law which

Defendants more strenuously object to the Magistrate's conclusion that Turner's actions constituted a legal cause of plaintiffs' constitutional deprivation. The critical causation inquiry is whether Turner "was in a position to take steps that could have averted" the attacks on plaintiffs "but, through callous indifference, failed to do so. Resolution of this issue necessarily entails a very individualized approach, taking into account the duties, discretion, and means" of the defendant. *Id.* at 1384. Defendants essentially maintain that the Magistrate painted with such broad strokes that he failed to analyze whether the conditions at GCI which were under Turner's control proximately caused the injuries to the particular plaintiffs at the particular times of each occurrence.

The district court is not persuaded. The following conditions which were under Turner's control provide direct causal links to plaintiffs' injuries. *First*, every plaintiff was attacked or threatened with a weapon, typically a knife. The evidence establishes the prevalence of such weapons and Turner's failure to take reasonable measures designed to control such contraband. *Second*, the long duration of several of the attacks, the places in which they occurred, and possibly the fact that they occurred in the first place, are functions of Turner's failure to take even minimal steps to ensure that GCI was

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caused plaintiff's constitutional injury. *See Williams*, 689 F.2d at 1381. The parties agree, however, that Turner could not have breached a duty imposed by Fla.Stat.Ann. § 20.315(1)(c) (West 1987 Supp.), the statute relied on by the Magistrate, because that statute on its face applies only to the DOC and not to individual superintendents. The objection is sustained, and Magistrate's conclusion in this regard (DE 128, at 111-13) is rejected.

adequately patrolled (Aldred raped in shower for fifteen to twenty minutes; Durrance led away at knifepoint from place between bunks which was concealed by hanging blanket; Bronson raped with baseball bat on recreation field in broad daylight; Saunders raped in bathroom for twenty-five to thirty minutes; Harper raped in top bunk; Cobb stabbed in front of canteen in fight lasting ten to twelve minutes). *Third,* Turner's failure to implement adequate reporting procedures for rapes and assaults was a legal cause of plaintiffs' psychological and possibly physical damage (Aldred reported rape to several officers with no results; Aldred not given protective confinement; Durrance and Bronson did not report out of fear of consequences; Sanders raped by two inmates who previously had attacked him; Saunders reported rape and received inadequate treatment and no investigation; inmates identified as assailants by LaMarca were not confined for investigation and continued to assault him; classification officer told Johnson to take protective confinement or to get a weapon and fight back). *Fourth,* Turner's callous indifference to the obvious and rampant indicia of homosexual activity was the proximate cause of rapes, attacks, or repeated harassment (Aldred, Durrance, Bronson, Saunders, and Harper raped; Bronson forced to commit nonconsensual sexual act in movie trailer; Johnson sexually harassed and later attacked four times; constant threats and sexual solicitation caused LaMarca to escape, take protective confinement, and receive disciplinary reports; Cobb injured in fight over homosexual). *Fifth,* Turner's failure adequately to supervise correctional officers up to the lieutenant level resulted in corruption and incompetence among the officers and a lack of reasonable

protection of inmates (Cobb's assailant worked as an "enforcer" with GCI staff and was protected by them; LaMarca complained to Barrett about threats and assaults and was given a knife by Barrett; Bronson afraid to report rape because he had witnessed inmates exchanging money and drugs with guards). The Magistrate's findings, supported by the record, contain more examples of how Turner's callous indifference proximately caused the injuries to Aldred, Durrance, Bronson, Saunders, Harper, Johnson, Cobb, and LaMarca.

The district court is not satisfied, however, that the requisite causal connection has been established with respect to the claims of Epprecht and Gordon. When Epprecht was assaulted with a pipe in the dormitory, he could see no guard in the wicket. Because there is no other evidence regarding the attack, such as its length, the district court is unable to determine whether the lapse in supervision was merely accidental or whether it flowed from Turner's actions. The fact that the attack was provoked because Epprecht possessed cash money also does not establish causation because a cash money system in prison does not in itself prove callous indifference. Similarly, with respect to Gordon, the evidence shows only that he was assaulted three times at GCI. He was knocked unconscious once in front of the canteen, his buttocks were burned when inmates who had been drinking prison-made wine set his polyester underwear on fire, and he was hit in the head with a pipe in a robbery. The eighth amendment entitles a prisoner only to *reasonable* protection from violence. *Williams*, 689 F.2d at 1380. The district court fears that, were it to find Turner liable for the damage sustained by Epprecht and Gordon,

Turner might become an insurer for every attack on an inmate which occurred during his tenure. The recommended $17,000 award of compensatory damages to Epprecht and the $6,000 to Gordon must therefore be rejected.

In summary, the facts and the law support the Magistrate's conclusions that certain of defendant Turner's actions and inactions in running GCI constituted callous indifference to plaintiffs' eighth amendment right to reasonable protection from violence. The evidence further establishes that, with respect to all of the plaintiffs except Epprecht and Gordon, Turner was in a position to take steps that could have averted the attacks on these plaintiffs but, through his callous indifference, failed to do so. The record finally establishes that these constitutional deprivations were a legal cause of plaintiffs' damages. Under the prevailing law in this circuit, *see id.* at 1381, plaintiffs Aldred, Durrance, Bronson, Saunders, Harper, Johnson, Cobb, and LaMarca should prevail against defendant Turner under 42 U.S.C. § 1983.

VIII.

OBJECTIONS TO INJUNCTIVE RELIEF

The Magistrate found that, although defendants had instituted improvements of unconstitutional conditions at GCI, there was a reasonable expectation that the violations would recur. Accordingly, the Magistrate held that defendants' efforts at correcting deficiencies at GCI did not deprive the court of the power to order injunctive relief. *See County of Los Angeles v. Davis*, 440 U.S. 625, 631,

99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979). He recommended the creation of two committees, one of penologists and the other of psychologists or psychiatrists, to advise the court in the formulation of specific injunctive relief. The charter of the committee of penologists is to ferret out other rape victims at GCI who were not identified through this litigation so that they might be provided with therapeutic assistance and to review and develop procedures at GCI to minimize future assaults, extortions, and rapes. The charter of the committee of psychologists or psychiatrists is to prescribe a treatment plan for the plaintiffs and witnesses in this action who remain incarcerated and to develop procedures at GCI to provide rape victims with support similar to that received by unincarcerated rape victims from rape crisis centers.

Defendants argue that the establishment of the committees was premature because the Magistrate adjourned the class action aspect of the case before defendants had an opportunity to present evidence countering plaintiffs' claims regarding current conditions at GCI. Although it is true that the parties presented incomplete proof on the issue of injunctive relief, the district court is not persuaded that at this juncture further evidentiary hearings are appropriate. In particular, the district court recognizes its lack of expertise in resolving the "complex and intractable" problems of prison administration. *Procunier v. Martinez*, 416 U.S. 396, 404-05, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974). The committee recommended by the Magistrate would provide valuable expert testimony to the court on the persistence of unconstitutional conditions at GCI and recommended equitable remedies.

The injunctive relief recommended by the Magistrate is adopted with the following modifications. Two committees shall be established, one of penologists and the other of psychologists and psychiatrists. Each committee will be comprised of three members. Each party will nominate one member of each committee. The third member of each committee will chair the committee and will be selected by the district court. The parties will submit names of persons they recommend for the position of chairman, including a curriculum vitae for each nominee, and the district court will consider these recommendations in appointing the third member of each committee. The charter of the committees will be that recommended by the Magistrate, with the additional task of reporting to the court on the status of current conditions at GCI and the necessity for further injunctive relief. The work of the committees will not end with this original report, as their expertise may be needed from time to time to assist in monitoring conditions at GCI. The cost of establishing and maintaining the committees shall be borne by the State of Florida.

The parties shall file their nominations of committee members with the district court by June 17, 1987. Thereafter, the district court will issue an order setting forth its selection of the chairman of each committee and establishing a date by which the committees shall file a written report with the court in accordance with the terms of this order. After the committees have filed their reports, the parties will have ten days in which to file a motion if they desire to present additional evidence regarding current conditions at GCI and the necessity of further injunctive relief. Such motions shall be accompanied by an offer of

proof which shall include a list of witnesses and the substance of their proferred testimony. The parties will have five days to respond to each other's motions. After it has the reports of the committees and these submissions of the parties, the court will determine whether additional hearings are necessary to formulate specific injunctive relief.

IX.

CONCLUSION

In accordance with the terms of this memorandum and order, it is

ORDERED and ADJUDGED that the report and recommendation of the Magistrate filed January 8, 1986 (DE 128) is affirmed and adopted as the order of this court except as modified or rejected by this order. It is further

ORDERED and ADJUDGED that judgment shall be entered for plaintiffs LaMarca, Saunders, Johnson, Aldred, Bronson, Cobb, Durrance, and Harper and against defendant Turner in accordance with the following award of compensatory damages for Turner's violation of plaintiffs' constitutional rights:

Anthony LaMarca	$9,000.00
Martin Saunders	$30,000.00
Edwin Johnson	$13,000.00
David Aldred	$30,000.00
Steve H. Bronson, Jr.	$30,000.00
Eddie Cobb	$6,500.00
Ron Durrance	$30,000.00
Billy Joe Harper	$30,000.00

Interest on this Judgment shall run from the date of judgment until paid, at the rate of 7.02 percent. It is further

ORDERED and ADJUDGED that on the claims of plaintiffs Epprecht and Gordon judgment shall be entered for defendants and against plaintiffs, the plaintiffs to take nothing. It is further

ORDERED and ADJUDGED that two committees shall be established to advise the court in the formulation of injunctive relief, in accordance with the court's specific directives set out at page 666 of this memorandum and order. It is further

ORDERED and ADJUDGED that defendants' motion filed February 10, 1986 for an enlargement of time to respond to plaintiffs' motion for attorneys' fees and expenses (DE 149) is granted as follows: Defendants shall have twenty days from the date of this order to file their response. It is further

ORDERED and ADJUDGED that the court will defer ruling on plaintiffs' motion filed January 31, 1986 for oral argument on their motion for fees and expenses (DE 141).

REPORT AND RECOMMENDATION

Jan. 8, 1986

PETER NIMKOFF, United States Magistrate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

"The degree of civilization in a society can be judged by entering its prison" Dostoevsky[1]

A. PROCEDURAL BACKGROUND

1. GENERAL BACKGROUND

1. On May 14, 1982, over three and one-half years ago, Anthony LaMarca, then an inmate at the Glades Correctional Institution (hereinafter "GCI") in Belle Glade, Florida, filed a handwritten complaint *pro se* in this Court under 42 U.S.C. § 1983, suing Defendant R.V. Turner, Superintendent of that institution. The Complaint contained, *inter alia*, allegations that Plaintiff LAMARCA was was [sic] being subjected to ongoing physical violence and harassment by other inmates because of his refusal to participate in homosexual activity, and that officials at the institution failed to take any corrective action to alleviate that situation.

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[1] Similarly, our Chief Justice has observed: "[T]he way a society treats those who have transgressed against it is evidence of the essential character of that society." *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 3199, 82 L.Ed.2d 393 (1984) (Burger, C.J.).

2. On June 14, 1982, this case was referred to me for further proceedings.[2]

3. On September 21, 1983, Plaintiff LaMarca, now represented by counsel and joined by three other former and/or present inmates at GCI, Martin Saunders, Edwin Johnson, and Henry Rosenbaum,[3] filed an Amended Complaint Class Action on behalf of themselves and other inmates at the Institution, seeking to redress physical and sexual assaults and threats of physical and sexual assaults. In the Amended Complaint Plaintiffs sought declaratory and injunctive relief to enjoin Defendants from various practices and inaction which resulted in Plaintiffs', and the proposed plaintiff class, being subjected to violence, threats, and sexual abuse by other prisoners. The four named plaintiffs also sought damages on behalf of themselves. In addition, the Amended Complaint Class Action named Louie L. Wainwright, Secretary of the Florida Department of Corrections as a

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[2] The case was transferred, pursuant to Local Rule 1(f) (Magistrate Rules of the United States District Court, Southern District of Florida) which provides:

> (f) Prisoner Cases Under 42 U.S.C. § 1983.
>
> A Magistrate may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a District Judge a report containing proposed findings of fact and recommendation for the disposition of petitions filed by prisoners challenging the conditions of their confinement.

[3] The claims of Plaintiff Henry Rosenbaum were severed from this action by Order of this Court of July 15, 1985.

Defendant.[4] Plaintiffs did not request a trial by jury in their Amended Complaint or in any other related pleading.

4. On November 2, 1983, Defendants' filed their Answer to Plaintiffs' Amended Complaint. Like Plaintiffs, no demand for jury trial was made by Defendants.

5. On April 13, 1984, this Court (Paine, J.) ordered that this case proceed as a class action defined as those persons who are or will be incarcerated at the GCI for purpose of the injunctive relief sought by the named plaintiffs.

6. On August 26, 1985, Plaintiffs filed a Motion for Leave to File a Second Amended Complaint simultaneous with the proposed amended pleading, which was granted by this Court on September 19, 1985, *nunc pro tunc* August 26, 1985. The Second Amended Complaint virtually mirrored the allegations in Plaintiffs' Amended Class Complaint filed two years earlier alleging that certain practices by Defendant prisoner officials resulted in Plaintiffs' being assaulted, battered, and/or homosexually raped. Seven additional plaintiffs[5], all present and

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[4] Louie Wainwright, Secretary of the Florida Department of Corrections has been subsequently dropped as a party defendant. *See*, Plaintiffs' Second Amended Complaint (filed August 26, 1985).

[5] The seven additional plaintiffs added in the Second Amended Complaint are: (1) David Aldred, (2) Steve H. Bronson, Jr., (3) Eddie Cobb, (4) Ron Durrance, (5) Wayne Epprecht, (6) Michael Gordon, and (7) Keith Harris.

Prior to commencement of trial on December 2, 1985, with a written Order following on December 10, 1985, this Court

former inmates at GCI, were added in the Second Amended Complaint, each of whom suffered the same injuries as the named plaintiffs and the class. These seven additional named plaintiffs sought compensatory damages from Defendant R.V. Turner resulting from his alleged unconstitutional action against them.

7. Randall Music, the present Superintendent at GCI, was added to the Second Amended Complaint as a Defendant, solely for the purpose of injunctive relief since he had replaced R.V. Turner as Superintendent. Music is sued only in his official capacity.

8. On October 8, 1985, Defendants filed a Motion for More Definitive Statement in response to Plaintiffs' Second Amended Complaint. On October 25, 1985, in response to the Defendants' Motion, Plaintiffs filed a twelve-page pleading providing Defendants with a factual overview response to the various requests for more information raised in Defendants' Motion.

9. On November 6, 1985, Defendants Turner and Music, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, served their "demand for trial by jury on all issues so triable." In their demand for jury trial, Defendants stated "the action is not at issue." Apparently, this was Defendants' view in light of the fact that Defendants' Motion for More Definitive Statement was still pending and no answer had been filed yet to the Second Amended Complaint. Defendants further stated that while their "Demand" would ordinarily be contained in

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granted Plaintiff Keith Harris' request to withdraw as a party to this action.

their Answer, they wanted to advise parties and the court at this time of their intent to request a jury trial.

10. On November 13, 1985, Defendants filed a Motion to Continue the trial scheduled for on December 2, 1985. On November 21, 1985, Plaintiffs filed a Memorandum opposing Defendants' Demands for Jury Trial and in Opposition to Defendants' Motion for Continuance.

11. Subsequently, on November 15, 1985,[6] Plaintiffs filed a Motion for Leave to File a Third Amended Complaint along with the amended pleading. The Third Amended Complaint provides for the dismissal of all claims relating to Plaintiff Keith Harris; substitutes a new Plaintiff, Billy Joe Harper; cures several typographical errors in the prior pleading; and, according to Plaintiffs, adds the State of Florida as a Defendant solely for the purposes of an attorney fee award, citing *Leggett v. Badger*, 759 F.2d 1556 (11th Cir.1985).

12. On November 25, 1985, following a hearing on the pending motions, this Court issued an Order which (a) granted Plaintiffs' Motion to file a Third Amended Complaint, *nunc pro tunc* November 14, 1985, without ruling on the presence of the State of Florida for purposes of the recoverability of attorneys fees; (b) denied Defendants' jury demand; and (c) denying Defendants' request for further continuance of trial.

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[6] Although the Third Amended Complaint was not filed with the Court until November 15, 1985, Defendants had received a copy of the pleading one week earlier on November 8, 1985. *See*, Defendants' Motion for Continuance filed November 13, 1985, p. 3.

13. On November 27, 1985, Defendants, pursuant to Magistrate Rule 4(a) of the Local Rules of this Court, filed an Emergency Appeal from the November 25, 1985 Order of Magistrate Nimkoff to the United States District Court Judge Paine on grounds that the Magistrate erred (1) in denying Defendants' demand for jury trial; and (2) in denying Defendants' request for continuance of trial.

14. On November 29, 1985, Defendants filed their Answer to Plaintiffs' Third Amended Complaint. On December 2, 1985, Judge Paine denied Defendants' Appeal from Magistrate's Order of November 25, 1985.

15. While not stated in the November 25, 1985 Order, this Court's reasoning in denying Defendants' Demand for Jury Trial is set forth herein.

2. JURY TRIAL DEMAND

a. FEDERAL PRINCIPLES REGARDING WAIVER OF RIGHT TO JURY TRIAL

16. The Seventh Amendment to the Constitution preserves the right of trial by jury "in suits of common law." However, the right to a jury trial, although constitutional, is indeed waived by a failure to demand it in a timely fashion. Fed.R.Civ.P. 38(d);[7] *Cox v. C.H. Masland and Sons, Inc.*, 607 F.2d 138, 142 (5th Cir.1979).

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[7] Fed.R.Civ.P. 38(d) states:
The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

17. Specifically, Rule 38(b)[8] provides that a demand for a jury trial of any issue be served within ten days of the "last pleading directed to such issue."

18. It is further well-settled that if the original pleadings in an action effectively waive trial by jury under Fed.R.Civ.Proc. 38(b) and (c), the right to trial by jury of all matters waived in those pleadings "cannot be later revived by amending the original pleadings." *Walton v. Eaton Corp.* 563 F.2d 66, 71 (3rd Cir.1977); *Hostrop v. Board of Junior College District No. 515,* 523 F.2d 569, 581 (7th Cir.1975); *Trixler Brokerage Co. v. Ralston Purina Co.,* 505 F.2d 1045, 1049 (9th Cir.1974); *Lanza v. Drexel and Co.,* 479 F.2d 1277, 1310 (2nd Cir.1973); *Williams v. Farmers and Merchants Ins. Co.,* 457 F.2d 37, 38 (8th Cir. 1972); *Connecticut General Life Ins. Co. v. Breslin,* 332 F.2d 928, 931 (5th Cir.1964); 9C *Wright and Miller,* Federal Practice and Procedure § 2320; 55. Moore *Federal Practice,* ¶¶ 38-39[2].

19. While a jury trial may be demanded for any "new issues" within the meaning of Rule 38 raised by the amended pleadings, the "amendment does not revive a right previously waived to demand jury trial on the issues already framed by the original pleadings." *Walton v. Eaton Corp., supra,* 563 F.2d at 71-72; *Williams v. Farmers*

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[8] Rule 38(b) provides:

(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

and Merchants Ins. Co., supra, 457 F.2d at 36 and cases cited therein.

20. The various Circuit Courts of Appeals generally have reasoned that amended pleadings which concern the "same general issues" do not raise "new issues within the meaning of Rule 38(b) even if they differ from the earlier pleadings in some particulars." *See, Walton v. Eaton Corp., supra,* 563 F.2d at 72; *Hostrop v. Board of Junior College District No. 515, supra,* 523 F.2d at 380-81; *Trixler Brokerage Co. v. Ralston Purina Co., supra,* 505 F.2d at 1049-50; *Lanza v. Drexel and Co., supra,* 479 F.2d at 1309-11; *Moore v. United States,* 196 F.2d 906, 908 (5th Cir.1952).

b. APPLICATION OF PRINCIPLES TO THE FACTS IN THIS CASE

21. On September 21, 1983, Plaintiffs filed their Amended Complaint Class Action. On November 2, 1983, Defendants served their Answer. Neither party filed a Request for Jury Trial at that time. On November 6, 1985, over *two* years after filing their Answer to Plaintiffs' Amended Complaint Class Action, Defendants served their Demand for Jury Trial.

22. The Court finds that Defendants' failure to comply with Rule 38(b) in not demanding a jury trial within ten days of the filing of their Answer on November 2, 1983, constituted a waiver of their right to a jury trial. *U.S. v. 110 Bars of Silver Coins,* 508 F.2d 799 (5th Cir.1975) *cert. denied* 423 U.S. 861, 96 S.Ct. 118, 46 L.Ed.2d 89 (1975); *McCorstin v. U.S. Dept. of Labor,* 630 F.2d 242, 244 (5th Cir.1980); 9 *Wright and Miller,* Fed. Practice and Procedure, § 2320 at p. 92 (1972) ("[T]he demand for jury trial

must be served within ten days after service of the answer.").

23. Indeed, in their November 6, 1985 Jury Trial Demand, Defendants state *no* reasons why they did not timely request a jury trial following their November 2, 1983 Answer, but merely identify issues pertaining to Plaintiffs' Second Amended Complaint filed on September 21, 1985.

24. While this Court, under Fed.R.Civ.Proc. 39(b),[9] may have authority to grant Defendants' demand for jury trial notwithstanding their belated request, none of the factors identified by our Circuit which would justify a tardy request are present here. *See, Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir.1983) (Trial Court did not abuse its discretion in denying Defendants belated jury request). Factors identified by the Eleventh Circuit in *Parrot v. Wilson, supra*, 707 F.2d at 1207 to be reviewed by this Court in evaluating whether to grant Defendants' belated request for jury trial include:

> (1) whether the case involves issues which are best tried to a jury; (2) whether granting the motion would result in a disruption of the court's schedule or that of the adverse party; (3) the degree of prejudice to the adverse party; (4) the length of the delay in having requested a jury trial; and (5) the reason for the movant's tardiness in requesting a jury trial.

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[9] Rule 39(b) states in part:
[N]otwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury on any or all issues.

25. Applying these factors to Defendants' untimely jury trial request support the denial of Defendants' belated request. *First*, the complex issues involved in this litigation regarding the constitutionality of conditions at the Glades Correctional Institution are most typically not subject to jury trials. *Second*, granting Defendants' motion would certainly prejudice Plaintiffs' trial preparation. *Third*, this is *not* a situation where a party makes a belated jury trial request several days, weeks, or even months following their last pleading. Indeed, Defendants' request was made over *two years following* their answer to Plaintiffs' Amended Complaint Class Action and less than *one month prior* to the beginning of the December 2, 1985 trial. *Finally*, Defendants offer *no* reason for their tardiness and our Circuit and its predecessor has repeatedly rejected "mere inadvertence on the movant part" as a basis to allow a tardy jury trial request. *Parrot v. Wilson, supra*, 707 F.2d at 1267; *Rhodes v. Amarillo Hospital District*, 654 F.2d 1148, 1154 (5th Cir.1981); *Mesa Petroleum Co. v. Coniglio*, 629 F.2d 1022, 1029 (5th Cir. 1980).

26. Under Rule 38(b), pleading "amendments not introducing new issues will not give rise to a jury trial." *Guargando v. Estelle*, 580 F.2d 748, 752-753 (5th Cir. 1978). A party's failure to demand a jury trial waives his "right as to all issues relating to the general area of dispute." *Walton v. Eaton Corp. supra*, 563 F.2d at 66. In rejecting the claim that a new issue had arisen in the amended pleadings which revived the right to request a jury trial, the *Walton, supra*, 563 F.2d at 73, Court reasoned:

> Both "amendments" pleaded facts which had not been alleged in the previous complaints, but neither raised a "new issue," since they did not

change the "basic issue" in the case or the "general area of dispute."

27. The *only arguable new issues* raised by Plaintiffs' Second and Third Amended Complaints would relate to the additional plaintiffs.[10] However, since evidence pertaining to the injuries suffered by additional plaintiffs while at GCI would be introduced irrespective of the pleading amendment as support for Plaintiffs' injunctive relief, no new issues are raised. *Hostrop v. Board of Junior College District No. 515, supra* (All the evidence which might be introduced under amended claims was probative evidence of pre-amended claims this additional count did not introduce a new issue.); *Lanza v. Drexel and Co., supra,* 479 F.2d at 1310 (Jury trial waived "as to all issues relating to the general area of dispute.").

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[10] The Amended Complaint in this action, filed over two years ago, raises claims that inmates at Glades Correctional Institution were being assaulted, battered, and/or homosexually raped because:

> 2. There is, within this institution, a pervasive risk of harm to inmates. Prisoners are repeatedly threatened, beaten and sexually abused by other prisoners. This occurs with the knowledge of the institution staff and is due to the staff's unwillingness or inability to prevent it.
>
> 3. There are no protective measures available to inmates of GCI that do not result in the inmates' confinement under punitive, degrading and inhuman conditions.
>
> Amended Complaint at Pgs. 1-2.

These allegations were denied by Defendants in their Answer filed November 2, 1983. Plaintiffs' Second Amended Complaint, served August 26, 1985, like their Third Amended Complaint, is based on these identical allegations.

* * *

28. Having considered all of the evidence presented over a 10 day trial held in United States District Court for the Southern District of Florida in Miami, Florida on December 2-6, 9-13, 1985; heard testimony of 27 witnesses and reviewed a series of Exhibits and depositions of an additional series of inmate witnesses; requested, received and closely reviewed extensive post trial submissions; and heard oral argument of counsel on December 27, 1985, the Court pursuant to Rule 52(a) F.R.C.P., now issues its Findings of Fact and Conclusions of Law.

B. GLADES CORRECTIONAL INSTITUTION

1. HISTORY

29. Glades Correctional institution is one of thirty major prison facilities in the State of Florida. (Turner) As the second oldest prison in Florida, the development of Glades Correctional Institution reflects the recent history of the State. (Swanson, Pg. 36). The State of Florida acquired the site where the present institution is located through land acquisitions from delinquent tax payers under the Depression Era Murphy Act. (*Ibid*). Built in 1932, the facility began its operation and was known as State Prison Farm No. 2. (Turner). Located in agricultural western Palm Beach County, the facilities' inmates grew fresh vegetables for the three state institutions: Florida State Prison, Chattahoochee State Hospital, and the Work Farm. (*Ibid*, Pgs. 36-37).

30. Throughout the first several decades of its existence, GCI was a black segregated facility whose inmates worked in various agricultural endeavors. (Turner). In

the early 1950's, the institution moved into the open dormitory buildings at its current location. A federal mandate integrated the all-black prison. (Swanson, Pg. 37).

2. OVERVIEW

31. Defendant R.V. Turner held the position of Superintendent of GCI from mid-1976 through his retirement on August 31, 1984. (Turner). Ron Jones was Superintendent in an interim capacity from September 1, 1984, through October 15, 1984. Thereafter, present Superintendent Randall Music served as Superintendent. (Swanson, Pg. 38). Mr. Music's last day as Superintendent coincided with the last day of trial, December 13, 1985. (Music)

32. As of July 29-31, 1985, 875 inmates were incarcerated at GCI. (P.Ex. 7) (Prison Inspector Report). Approximately 60% of these inmates were Black; the remainder were White or Hispanic. (*Ibid.*)

33. While Superintendent Music estimated the Hispanic population at 7% to 10%, records reflect that during an earlier period germane to this litigation, the Hispanic population was apparently even higher. D.Ex. 7 (Supt. Monthly Report of November, 1981, Pg. 2) ("Potentially serious management problems may develop due to *large contingent* of Latins in population.") (emphasis added). Because of DOC's general, although not absolute policy of incarcerating inmates as close to their home areas as possible, GCI draws many of its inmates from the South Florida area. (Brierton, Pg. 42) *See, also,* (Swanson, Pg. 129) ("Superintendent Music said that GCI seemed to have the function of taking care of anything in South

Florida that no one else can handle, that it has become the catch-all for the Southern region."). During the Turner administration, 65% to 70% of those incarcerated were "close custody" prisoners. (Turner)

34. Inmates are housed in four open dormitories at GCI. These dormitories are referred to as Dorm A, B, C and D. Dorm A and D are the larger dormitories at any given time housing approximately 200 to 300 inmates. Dorms B and C are somewhat smaller and have a capacity to house approximately 70 to 80 inmates. (Swanson, Pgs. 112-113) The dormitories are arranged in the same manner insofar as inamate [sic] bunk arrangements. In A and D Dorms there were three rows of 20 bunk beds on each of the two wings within a dormitory. In B and C Dorms double bunks are also arranged in three rows. Dorm E is an honor dorm, which is somewhat different from the others.

35. In the front of each dorm there is a doorway. Behind the doorway is a screened area in which an officer is situated. This area is separated from all contact with the inmates by a cage, which is referred to as a "wicket." (Swanson, Pgs. 111-112). There are two dayrooms within the four main dormitories. On one side of the dayroom is a television and on the other side are game tables. (Swanson, Pg. 138). At the end of the dorm on the far side are the showers. In the shower area there are also urinals, washing and bath facilities. The shower areas are obscured from view if an officer is stationed in the "wicket." *See,* (P.Ex. 40, 41 and 42), (drawings of bunk, shower, dayroom and confinement areas by Dr. Swanson). *See also,* D.Ex. 1a-3c. (Composite photographs)

C. THE CONTEXT

36. The individual named Plaintiffs' damage claims can be analyzed only within the context of the general operational policies, practices, conditions and events existing at the general time period in which their claims arise. Disparate factors – ranging from wholesale manufacture of prison wine and regular screenings of sexually explicit videotapes to a heterosexually starved audience of inmates, to the maintenance of an ill-assorted guard corps whose members the inmates perceived as regularly trafficking in contraband, extortion, and neglect – converge into a tapestry that forms the backdrop for Plaintiffs' claims. A discussion of these contextual realities follows.

1. AN INSTITUTION

a. OFFICIAL DOCUMENTATION

37. Several written documents provide critical evidence as to the general nature and depth of security problems existing at GCI during the relevant time period of Plaintiffs' damage claims. (1980-1984).

(1) TURNER'S ACKNOWLEDGEMENTS TO SECRETARY WAINWRIGHT

38. Conditions at GCI were known to Superintendent Turner. On July 16, 1981, Turner wrote to the Secretary of Florida's Department of Corrections Louie L. Wainwright and informed him of the following:

> On an almost daily basis I feel that our security staff is simply being tolerated by the inmate

> population *rather than being in control of the operation* of the institution. (emphasis added). (D.Ex. 13, Pg. 2).

39. Similar acknowledgement of severe security problems were provided in an earlier correspondence from Turner to the Secretary on March 15, 1979. (D.Ex. 14) (Vacancies of 1/3 of total COI's staff is "dangerous to the staff *and* inmate population. [emphasis in original] Only two officers assigned to 220 inmate dorm for supervision of inmates.") Turner stated:

> Currently our count is in the neighborhood of 800. Approximately 400 of these inmates are close custody. I am apprehensive about our ability to *control* this population under the circumstances. (emphasis added).[11] (D.Ex. 14).

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[11] It is noteworthy that during this general period when Turner recognized the severity of the problems at GCI, D.Ex. 14 ("I felt that it was necessary to bring you up to date on this critical situation") the institution received its first accreditation in 1980 and subsequently again in 1984 (Mulally). Indeed, at the time of the first accreditation and during that general time period of Turner's acknowledgement to Secretary Wainwright of severe and dangerous security problems, GCI was given the second highest score for an institution in the State. (*Ibid.*) (Swanson, Pgs. 278-279).

The accreditation process was explained at some length by Ray Mulally, a Department of Corrections (DOC) employee in charge of securing institutional accreditation in Florida. (D.Ex. 6). Plaintiffs' correctional expert, Dr. Richard Swanson, noted that during litigation concerning conditions at the Florida State Penitentiary (FSP) was receiving its accreditation while at the same time the trial court was concluding that conditions and practices were unconstitutional. Further, notwithstanding the serious and long-standing system-wide litigation of *Costello v. Wainwright* in which the United States District Court for the

(2) THE 1980 PALM BEACH COUNTY GRAND JURY PRESENTMENT AND FINAL REPORT OF THE INSPECTOR GENERAL (1980)

40. In 1980, the Palm Beach County Grand Jury issued a presentment on January 30, 1980. The apparent impetus for the Grand Jury Presentment related to issues involving a audit and inventory relating to shortages of certain food products. However, the presentment also raised serious issues of inmate security germane to this case. Matters relating to the primary issues raised by the Presentment which concerned discrepancies in audit and shortages of meat and food, raised additional general matters concerning a breakdown of proper prison management: shortages were caused, among other reasons, through theft by inmates and staff. (P.Ex. 4, Pg. 3 of Grand Jury Presentment). Additionally, and more germane to the issues raised in this case, is the reporting through various testimony before the Grand Jury of problems relating to "lax security precautions." Testimony of staff and inmates revealed a free flow of contraband "including drugs, alcohol, gambling, theft, confiscation, and payoffs among the inmates and personnel of GCI." (*Ibid,* at Pg. 6).

41. Approximately eight (8) months later, the Department of Corrections Office of Inspector General conducted its management review of GCI. (P.Ex. 4, Tab B).

Middle District of Florida has consistently found practices and conditions which offend the constitution, literally all institutions remain accredited. (Swanson, Pgs. 278-279; 410-412).

For these reasons, the Court finds the GCI accreditation as having virtually no significance to this litigation.

The Office of Inspector General, under the direction of David Brierton, was established in 1979 (Brierton, Pg. 47) and acts as an independent auditor and investigative arm of DOC (Brierton, Pgs. 6-7).

42. The Inspector General Report observed and corroborated similar issues concerning a breakdown of security as those identified in the Palm Beach County Grand Jury Presentment. The Inspector General found, among other matters, that

> "[s]upervision in all three general areas of the compound must be described as serious, due to the lack of security personnel. Vacancies continue to be a serious problem. The dormitory situation is critical as there have been occasions when one dormitory officer is responsible for supervising more than one dorm at the same time." (P.Ex. 4, Tab B, Pg. 4 "Executive Summary").

43. Additional reporting of increase "inmate on inmate" and "inmate on staff" assaults reflected an increase over a past six month period (*Ibid*, Pg. 5). These assault trends, both inmate on inmate and inmate on staff were reflected elsewhere. (*Ibid*, Pgs. 20-21), ¶ 9.1 "Conclusions and Recommendations").

44. Moreover, the security problems were exacerbated by low morale GCI staff. An employee survey conducted by the Inspector General revealed that staff members did not feel that there were enough people in their unit to perform their duties properly, and when asked the question, "Did you receive instructions or

guidelines on the responsibilities and supervisory functions of your job when you became supervisor?," they answered with a "resounding no." (*Ibid*, ¶ 29.1, Pg. 33).

(3) THE 1983 INSPECTION REPORT OF THE OFFICE OF THE INSPECTOR GENERAL

45. Approximately three years later, on September 19-21, 1983, DOC's Office of Inspector General conducted a subsequent investigation at GCI. In that report, the Inspector General noted "we fail to understand and appreciate laxity, in some instances, the disregard for established procedures." (P.Ex. 6, Pg. 2). In reviewing conditions at Belle Glade, the Inspector General offered the following overview: "In conclusion, the team found a need for a great deal of improvement at Glades Correctional Institution." (Ibid.). *See also*, (*Ibid* Pg. 9), (Security problems relating to an inmate armed with a homemade knife threatening a correctional officer); (*Ibid*, Pg. 22) ("Inmate personal property is in no way orderly or neat. Homemade lockers are abundant.").

b. MAJOR INCIDENTS

(1) THE BARRETT INCIDENT

46. On April 15, 1984, at approximately 6:30 P.M., a fight broke out in C Dormitory involving several inmates. As a result of the fight, a state of confusion developed at GCI. Lt. James Schrader, the OIC (Officer in Charge) requested that off duty personnel be summoned to the institution. Lt. William Barrett, the acting Chief Correctional Officer; Lt. L.A. Peters, GCI's Internal Inspector;

and Sgt. Ricky Hayes, were summoned. Those three individuals, were attending a local festival in Belle Glade known as the "Black Gold Festival". All three officers admitted they had been drinking alcoholic beverages. Barrett and Hayes had their faces made up to resemble clowns for the festival. Lt. Barrett and Sgt. Hayes arrived immediately and proceeded to the Gate House. Sgt. Barbara Wiesel, the Main Gate Supervisor, advised that there was an uncontrolled situation in C Dorm. Sgt. Wiesel reported at the time, that she noted a strong odor of alcohol, and noted that Lt. Barrett appeared to be absolutely unsteady on his feet and constantly leaning against the counter. Lt. Barrett requested that Sgt. Wiesel give him a shotgun and fifteen rounds of ammunition. Lt. Barrett loaded his shotgun. Lt. Barrett approached the C Dormitory. (Swanson, Page 208-210); (P.Ex. 9, Pgs. 1, 6 – The Special Investigation Entry No. 84-37911).

47. At that time, Lt. Barrett responded in slurred speech to Lt. Pipta, that "I want to teach these mother fuckers who runs this place". As Lt. Barrett remained outside, and Lt. Pipta entered C Dormitory and found the inmates sitting on their bunks and the situation otherwise calm. Barrett, while armed with a shotgun began yelling obscenities to the inmates and making threats such as "I'm going to kill you mother fuckers." Lt. Barrett then ordered the inmates brought out of the dorm. Inmates Robert Whidden and William Allen were ordered to lay face down on the sidewalk at which time Lt. Barrett smashed them in the back of the head with the shotgun and continued to "jab them in the back of the neck with the barrel and continued yelling at them." Inmate Allen's head was split open after being struck by the stock of Lt.

Barrett's shotgun. A third inmate, Westley Smith, was also struck. Two additional inmates, Jimmy Daniels and Melvin Kraft, were brought out from the dorm and kicked by Lt. Barrett. Following the incident, Superintendent Turner was made aware of what occurred. Turner did not notify the prison Inspector because he "did not feel that the situation warranted notification of a Prison Inspector" (Ibid., Pg. 5). The Inspector General, David Brierton, through his office, did conduct a thorough investigation (P.Ex. 9). The Inspector General's office concluded that Lt. Barrett had committed various prison Rule violations. (*Ibid*, Pg. 6-12)s Additionally, Lt. L.A. Peters, GCI's Internal Prison Investigator, was also found to have committed additional prison infractions. (Ibid., Pg. 10-11).

48. Plaintiffs' correctional expert, Dr. Richard Swanson, corroborated the findings of the Prison Inspector's Office in concluding that senior officer Lt. Barrett had made gross errors in judgment. Dr. Swanson observed that the violations were so gross that immediate action should have been taken to at least suspend Lt. Barrett from the operation of a prison.[12]

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[12] Although not directly related to Turner's management of the personnel aspects of the Barrett incident, Dr. Swanson referred to a transcript of a tape recorded conversation between Turner and an inmate, William Allen, in which Allen described the situation that led up to the disturbance of that precipitated Barrett's presence.

> In it, it's very clear the inmate is talking about the wide use of alcoholic beverages within the institution. In talking about this, it's clear from the conversation that's recorded in these pages, that it is not a surprise at all to Superintendent Turner that alcohol and drugs

49. Lt. Barrett remained functioning as a correctional officer for at least a full week following the April 15, 1984, incident. (P.Ex. 9, Exhibit 2) (Last page indicating the signature of William Barrett of April 23, 1984 on Incident Report).

50. Plaintiffs' expert, Dr. Swanson, noted his opinion that Superintendent Turner appeared to unduly delay in suspending Lt. Barrett. This was particularly poor management in the context of the egregious nature of the incident (Swanson, Pg. 329) ("His [Turner] initial reaction seemed to be oddly mild."); (Swanson, Pg. 211) ("The violation was so gross, that it seems to me that immediate action should have been taken to at least suspend the Lieutenant from the operation. Some action ultimately occurred, but took considerable amounts of time.")[13]

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are available on a widespread basis in the institution. (Swanson, Pg. 212).

[13] Indeed, Florida law permits an immediate suspension of a State employee such as Lt. Barrett in an incident such as this. *See*, Florida Administrative Code § 22A-10.046, which provides as follows:

> In extraordinary situations, such as when the retention of a permanent career service employee would result in damage to property, would be detrimental to the best interests of the State, or would result in injury to the employee, a fellow employee, or some other person, such employee may be suspended or dismissed immediately, provided that written notice of such action is furnished to the employee within twenty four hours.

Superintendent Turner himself was suspended *immediately* in a similar context for an incident which occurred on May 6, 1971. *See*, (P.Ex. 1, Tab D) (Letter of May 7, 1971 from Louis L. Wainwright to R.V. Turner).

(2) THE ILLEGAL ACTIVITIES OF OFFICER DIXON

51. In mid-1974 the activities of a correctional officer, Clarence Dixon, were investigated by various authorities including the Inspector General's Office of the Department of Corrections and the Palm Beach County State Attorneys Office. Evidence related to Mr. Dixon's trafficking in drug contraband and extortion of inmates and their families. This documented investigation corroborates other inmate allegations of wholesale staff corruption with regard to the extortion of inmates, and the free flow of contraband within GCI.

52. The investigation resulted in Mr. Dixon's being arrested and charged with three counts of bribery. (P.Ex. 10, Tab B, Pg. 5, Special Entry #84-4647). Moreover, the investigation of Officer Dixon further demonstrates the careless manner in which Dixon had been screened for employment. Prior to his employment at GCI, Dixon had been terminated from Pahokee High School following the Broward County school board's obtaining a revocation of Dixon's teaching certificate. While at Pahokee, Dixon had collected $75 fees from graduating students to introduce them to colleges, had taken them to the campuses, but had failed to make any arrangements for introduction (P.Ex. 10, Tab C, Memo of March 6, 1984); (Swanson, Pgs. 222-224).

(3) LARRY PRYOR

53. The assertions of Larry Pryor, while offering less conclusive credibility than the external investigative reports of Lt. Barrett and Officer Dixon, nonetheless

reveal additional evidence of wholesale staff corruption. Pryor worked as an informant-enforcer for various correctional officers, who either permitted him or directed him to harass other inmates (Deposition of Pryor, Pg. 35).[14]

54. Pryor worked with several officers (Ibid, Pg. 35). When Pryor indicated that he was going to do something about inmate Eddie Cobb, Pryor was told by Lt. Barrett that whatever he chose to do should be done on Barrett's shift (*Ibid*, Pgs. 39-40). Pryor understood that to mean that if he took any action against Cobb on Barrett's shift, he "wouldn't go to jail or get prosecuted for it." (Ibid., Pg. 17). Following a fight with Cobb in which Pryor stabbed him, Pryor was put in a confinement cell until "things blowed over," but was never given any disciplinary report (DR) for the incident. (*Ibid*, Pg. 19).

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[14] At the commencement of his testimony, Pryor indicated that he had been harassed by officials from the Department of Corrections at the Florida State Penitentiary, at Glades Correctional Institution, and at DOC's Dade Correctional Institution, over a period of several days prior to being transported to Miami for purposes of offering his testimony. While this Court makes no conclusive findings as to whether Pryor in fact was threatened by DOC officials due to his impending testimony, Pryor's earlier deposition testimony was accepted by this Court pursuant to Rule 32(a)(3)(E) Federal Rules of Civil Procedure.

Following Pryor's accusations that he had been threatened by DOC officials, he was appointed private counsel by this Court and upon counsel's advice Pryor chose at trial under the Fifth Amendment to refuse to answer any self-incriminating questions.

c. THE FREE FLOW OF CONTRABAND AND EXTORTION

55. A distinct picture of a wide range of free flowing contraband into GCI emerges from independent and corroborative sources of information and record evidence. The contraband includes: drugs, alcohol, weapons and extortion activities flowing from this illegal traffic.

56. Dr. Swanson, Plaintiffs' correctional expert, observed that "little or no effort was taken to control illicit activity" resulting "in readily available contraband" (Swanson, Pgs. 49, 326) including "drugs, alcohol and weapons to inmates apparently upon demand." (*Ibid*, Pg. 50). The free flow of contraband (Swanson, Pg. 121) seemed to be common knowledge; "people carried knives, people smoke dope without worrying or trying to hide it from officers" and the staff was "actively involved in these illicit activities," (*Ibid.*) as well as actually promoting the influx of contraband. (Swanson, Pg. 199). Swanson's conclusion, with which the Court agrees and so finds, provides an unmistakeable pattern of free flow of contraband, is based upon corroborative evidence

including: (i) written documentation[15], as well as by inmate testimony[16].

2. FAILURE TO PROPERLY SUPERVISE PERSONNEL AND MANAGE INSTITUTION

a. STAFF TRAINING

(1) WEAPONS

57. One barometer of poor staff training can be gleaned from internal GCI records. GCI incident reports

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[15] *See, e.g.,* (P.Ex. 4) (Palm Beach Grand Jury Presentment, pg. 6) ("Testimony of inmates and some correctional personnel indicate marijuana and other drugs are available to inmates due in a large part from lax security precautions. Alcohol use and its manufacture by the inmates' ingenuity also appears prevalent; Peters' investigation of 20 gallons of "buck" (inmate homemade wine) (Peters); (P.Ex. 4) (Management Review of GCI, "Conclusions and Recommendations; ¶ 10.1 40 disciplinary reports for "Consumption of Intoxicants" during 1-year period);

[16] See note 16 on page 677.
(P.Ex. 10) (Extortion and drug activities discussed in the Dixon matter); (P.Ex. 9) (Swanson, Pg. 212) (inmates access to alcohol discussed in the Barett [sic] incident); (P.Ex. 6, Pg. 9 (Prison Inspector Report) (laxity in security, inmate in possession of homemade knife.).

[16] (Pryor, Dep. Pg. 12) (Selling of marijuana by Pryor); (*Ibid*, Pg. 33) (access to knives by Pryor – "I have so many knives."); (Swanson, Pg. 57) (drugs, liquor available); (Swanson, Pg. 71) (joints smoked in front of guards); (*Ibid*) (inmates "strapped to the max" at GCI with knives); (Swanson, Pg. 77) (availability of dope and wine); (*Ibid*) (protection rackets involving dope and wine; (*Ibid*, Pg. 78) (staff afraid of inmates armed with knives and shanks; (La-Marca) (inmates had money from selling reefer making wine and weaons; (*Ibid*) (LaMarca given knife by officer to protect himself; (Gordon) (blacks ran drugs in GCI); (Epprecht) (free flow of drugs and alcohol at GCI.

revealed officers (P.Ex. 33) lack of familiarity with weapons. (Swanson, Pg. 135). This opinion of Plaintiffs' expert was also expressed to him by Lt. Peters in an interview and was not rebutted at trial. (*Ibid.*) Peters also noted that a recently implemented weapon system developed under Superintendent Music "may" solve some of the weapon problem. This system requires offices to first demonstrate some qualification with a weapon prior to obtaining it. (*Ibid.*, Pgs. 135-136).

58. Problems with improper training and use of weapons ranged from the Barrett incident to day-to-day incidents of problems with weapons by staff. (P.Ex. 33) (Incident Reports).

(2) STAFF OUT OF CONTROL

59. The Barrett-Dixon incidents underscore the day-to-day operation of GCI with its staff not controlled by Superintendent Turner. Staff morale was low. (P.Ex. 4, Management Review of GCI, ¶ 29.1, Pg. 33) (Employee questionnaire reflected that staff believed (i) not enough officers in unit to do job right and (ii) insufficient instructions and guidelines given when officers became supervisors). Turnover was high. (D.Ex. 14) (Turner letter to Wainwright) (Critical situation of 1/3 of staff vacancies); (P.Ex. 39) (Summary statistics of turnover rate) (Swanson, Pg. 184-185); (P.Ex. 31) (Superintendent Monthly Reports reflecting turnover). Officers worked excessive hours and often two shifts. (P.Ex. 39) (Swanson, Pgs. 184-188).

60. A direct result of a staff which was inexperienced, over-worked, under-educated, ill-informed, insecure, and otherwise unable to protect inmates under

their charge (i.e., reluctance to report rapes) is the general climate of a facility with a high security risk. (Swanson, Pg. 197)

b. FAILURE TO SUPERVISE STAFF

61. Directly related to the individual raping and assaults of the named plaintiffs was the lack of proper staff supervision due to Defendant Turner's failure to station the officers properly.

62. As Lt. Peters admitted, due to the (i) sheets, clothes and personal lockers hanging from the bunks (Swanson, pg. 318); (ii) the obstruction of a second level of bunks in the middle row of beds (*Ibid*), an officer's view from the cage or wicket in which he was stationed was obscured. (Peters) The view from the wicket into the shower area was even more obscured. (Swanson, pg. 113) Lt. Peters, the Chief Investigative Officer during the Turner administration, admitted the lack of any clear vision to the shower area by an officer stationed in the wicket because of the various obstructions. (Peters)

63. While Peters knew that officers were supposed to be on constant patrol within the dorms, this did not take place. (Peters) Moreover, and even more seriously, Turner could recall no action *ever* taken against an officer – by reprimanding, suspending, or otherwise disciplining – for failure to patrol the dormitories. (Turner)

c. NO PROCEDURE FOR INVESTIGATING RAPES

64. As discussed in greater detail, *infra*, ¶ 82, Lt. Peters, the Chief Internal Investigator at GCI, candidly

recognized that *no* procedure ("Standard operating procedure") existed in which to investigate rapes or alleged rapes. No standard interview process, no standard polygraph procedure, no standard rectal examination, no psychiatric examination, and no standard reporting to any law enforcement authority occurred. (Testimony of Peters and Turner). No such policy was ever written. (*Ibid*)

65. Indeed, Defendants' own witness, Inspector General Brierton, opined that at the very minimum: (i) medical evidence should be secured; (ii) a full statement taken from the alleged victim, and (iii) the matter should always be referred to a local prosecutor. (Brierton, Pgs. 109-111) These steps were not followed. (Peters); (Saunders, Pgs. 556-557); (Aldred, Pgs. 812-813); (Harper, Pg. 746).

66. This lack of any procedure relating to the investigation of rapes resulted in the prosecution of only one rape in the entire Turner administration. Moreover, no rapes were ever reported by GCI authorities in any of the massive amounts of internal documents generated from the institution. (Swanson, Pg. 150).[17]

67. The Court is convinced that the lack of investigative procedure led to an atmosphere where inmates

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[17] Several of the plaintiffs, who have alleged that they were raped, also reported that they had informed the correctional officers of the violation. *See*, Aldred, *infra*, ¶ 124; Saunders, *infra*, ¶ 154; and Harper, *infra*, ¶ 164.

Apparently, in the case of Saunders and Aldred that information was never relayed to any higher authority other than the Lieutenant to whom each personally reported his rape. As to Harper, the Court reviews his reporting elsewhere. *Infra*, ¶ 164.

could rape other vulnerable inmates without concern of being detected or deterred.

d. THE LAWSUIT

68. During the early stages of this lawsuit in 1982, this Court took testimony from Plaintiff LAMARCA (Swanson, Pg. 258). LaMarca provided an account of other inmates who had been abused or otherwise violated (*Ibid*, Pg. 259). Counsel for Defendants, Mr. Belitsky of the Attorney General's Office and Assistant Superintendent Arline, were present during the course of those proceedings (*Ibid*). The Court was assured by Messrs. Belitsky and Arline that a full investigation of Plaintiff's allegations of additional inmate violations would take place (*Ibid*, pg. 260).

69. Not only did it become apparent that no investigation occurred when no response was forthcoming from Defendants, but Defendant Turner testified that he was totally unaware that these assurances were made to the Court and that he was completely unaware even of the circumstances of this lawsuit until the recent pre-trial activities (Turner).[18]

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[18] In connection with a Return to Order to Show Cause filed under a certificate of service dated October 12, 1982, Lt. Peters executed an affidavit addressing the issues raised by the initial *pro se* complaint filed by Anthony LaMarca. Superintendent Turner was a party to the action at that date. The third paragraph of the affidavit reads:

> Be it also known that this affiant has prepared this affidavit with full knowledge and sanction of all parties named as Defendants in the above referenced case number.

70. Simply, the point is that this lawsuit, unquestionably raising matters of *grave* concern involving allegations of the most degrading violations to Plaintiffs, somehow got lost between the rather large "cracks" of Defendant Turner's management system. This account serves merely to underscore Plaintiffs' position that GCI, under the Turner administration, was an institution not under the control of that Defendant.

3. THE LACK OF THE MOST ELEMENTARY PROCEDURES TO MINIMIZE THE LIKELIHOOD OF RAPINGS AND ASSAULTS

a. KNOWLEDGE: THE INDICES OF RAPE THAT A PRUDENT ADMINISTRATOR WOULD DISCERN

71. It is clear to this Court that various indices, when considered in combination, should make it readily discernible to any prudent prison administrator that inmate rapes are occurring. The corollary, of course, is that armed with the knowledge that rapes were occurring, the failure to promulgate and adhere to the most rudimentary procedures constitutes a deliberate indifference toward inmate security. While none of the indices alone would reasonably suggest the occurrence of rape, the combination of these indices, as in this case, raises an issue of *knowledge* or *constructive knowledge* on behalf of Defendant Turner. The Court now reviews these indices.

72. *First*, the free flow of contraband, and assaultive inmate-on-inmate and inmate-on-officer behavior previously reviewed, provides a picture of an institution marred by violence and illegal activity. Plaintiffs' experts, Dr. Swanson and Dr. Caddy, as well as Defendant Turner

and Inspector Brierton, all agreed that rapes in prison are a manifestation of acts of violence and domination, in contrast to acts of sex. *See, infra,* ¶ 117. Thus, homosexual rape is but an additional and inevitable, albeit extreme, discord in the cacophony of inmate assaults, extortions, drunkenness, drug use, and armament that characterized GCI during the tenure of Defendant Turner.

73. *Second,* the consistent and disproportionate number of young white inmates who "checked in" to protective confinement further corroborates the white plaintiffs' recollection of terror on the compound. Consider, for example, the following statistical snapshot of the protective custody population in mid-September, 1983:

PROTECTIVE CONFINEMENT POPULATION[19]

WHITE	BLACK	TOTAL
20	1	21

(P.Ex. 6) (Inspection Report of September 19-21, 1983)

74. The volume of the warning that such statistics should have signaled was amplified by the punitive nature of protective confinement during the 1980-1984 period. The inmates who checked in were very distressed;

[19] Whites constituted a minority of the prison population (397 of 833 inmates) and those figures considered Hispanics as Whites. (P.Ex. 6)

otherwise they would not have been checking in (Caddy, Pg. 1265).

75. Moreover, the impact of the statistics is further underscored when considered in the context of the punitive nature of protective confinement, at least during the period of 1980-1984. Conditions in protective confinement were punitive; the cells lacked adequate ventilation (P.Ex. 5, Memo of September 22, 1985) (Prison Inspection Report); the lighting was poor (*Ibid*); two, three, four and five inmates were placed in the cells containing two bunks (*Ibid*); (Testimony of Eddie Johnson, Greg Zatler); the cells were infested with roaches and vermin (*Ibid*); inmates in protective confinement were taunted by others outside of the confinement area (Swanson, Pgs. 123, 139); protective confinement inmates often were housed with administrative detainees (Turner); no exercise was offered; showering was allowed only three times per week (Eddie Johnson and Greg Zatler); and inmates in protective confinement lost their canteen privileges. (*Ibid.*).

76. Notwithstanding the punitive nature of protective confinement, some inmates would remain in the confinement for months. Indeed the shortages of cell space attests to the inmate demand to "check in." (Swanson, Pgs. 203, 316) Plaintiffs' expert psychologist, Dr. Caddy, observed that the inmates who had opted to check into a confinement area as described would clearly manifest a high level of distress in the general dormitory population. (Caddy, Pgs. 1263-1266).

77. *Third*, the general "wolfing" and cat-calls of aggressive black inmates stationed around the compound

during the initial periods of incarceration when new inmates were transferred to GCI (particularly the smaller, younger and at least physically more vulnerable white inmates) would suggest, in combination with other factors, that sexual pressures were severe. The corroborative description of these inmate experiences to Dr. Swanson when he interviewed the individual Plaintiffs incarcerated in institutions in different parts of the State prior to the trial enhances the credibility of their individual recollections.[20] The Court finds that the events did take place.

78. *Fourth*, more overt signs of sexual activities, some consensual, further provide an indication of assaultive rape conduct. Sheets hung from the bunks; inmates moaning in their bunks; the showing of pornographic movies (Swanson, Pgs. 8-9, 375-376) in a trailer in which "cries and moaning" of inmates were heard, apparently are all part of the ritual at GCI.

79. *Fifth*, some rapes, in fact, were reported; although in the case of Plaintiffs Aldred and Saunders, Defendant Turner apparently was not made aware of these facts. Plaintiff Harper's reporting and subsequent

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[20] Consider, in addition to the similarities that Dr. Swanson testified to finding in the inmates' account of "wolfing" upon arrival, the similarities in the accounts given by those inmate plaintiffs who testified. Saunders was greeted by a "great multitude" of blacks in February, 1983, and described the scene as being like a "meat market" (Saunders, Pg. 536); LaMarca recalled catcalls from a "line of black inmates" about his being a "fat skinny white boy" (LaMarca, Pg. 948); and Aldred remembers 150 to 200 mostly black inmates pressing up to the fence and arguing about who would get him (Aldred, Pg. 893).

meeting with Turner is discussed elsewhere. *See, supra,* Pg. 678, n. 17.

* * *

80. Having reviewed the *knowledge* or *constructive knowledge* that rapes were occurring, the Court now addresses various elementary procedures that could have been utilized to minimize the likelihood of raping and assaults.

b. THE PROCEDURES WHICH SHOULD HAVE BEEN EMPLOYED

(1) IMPLEMENTATION OF A STANDARD PROCEDURE TO INVESTIGATE RAPES

81. As previously detailed, *see, supra,* ¶ 64, the Court has reviewed the fact that there existed no procedure known to the highest ranking investigator at GCI – Mr. Peters. (Peters) (No "standard operating procedure.")

82. In sum, no process or procedure was utilized to insure the full investigation of the possibility that a rapes [sic] had occurred.[21] This created an atmosphere where assaultive inmates could continue to prey upon more vulnerable prisoners and never run the risk of detection. Indeed, the Investigator at GCI, Mr. Peters had never talked to two of the Plaintiffs who reported being raped –

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[21] Among the investigative procedures *not* used were: polygraphing of alleged victims and assailants; rectal examinations of victims; psychiatric and psychological examinations of the victims; thorough interviews of the victims by trained investigators. (Peters and Turner)

David Aldred and Martin Saunders. Nor did Defendant Turner talk to these individuals.[22]

(2) NO REQUEST FOR INVESTIGATIVE AND PROSECUTORIAL ASSISTANCE

83. As previously noted during the entire Turner administration, Defendant Turner and Lt. Peters could recall only one rape incident ever prosecuted. (Peters and Turner) Other areas of criminal activity within the prison met with a similar fate. During Turner's administration no State prosecution was ever initiated for any weapons possession by an inmate at GCI. (Peters)

84. The Court further finds that the atmosphere that existed at GCI during the tenure of Defendant Turner was one in which inmates bent on rapes and other expressions of violence roamed the compound with impunity. It was an atmosphere fostered by the institutional leadership's failure to initiate criminal prosecution against any but one prison rapist. It was an atmosphere nurtured by Defendant Turner's refusal to seek assistance from outside state investigators (prison inspectors, sheriff's deputies, State Attorney's investigators) and prosecutors to deal with such state crimes as sexual battery, aggravated assault, and armed robbery, as well as to seek assistance from federal officials for criminal violations of 18 U.S.C. § 241, *et seq.*, or any other applicable federal statute

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[22] Inspector Brierton made clear that immediate interviews of alleged victims was a critical step in any rape investigation in an attempt to amass as much intelligence as possible. This is what we, of course, would expect in any criminal investigation. (Brierton, Pg. 109)

arising from such activities as those ascribed to Lt. Barrett and Correctional Officer Dixon. While accepting as true the Defendant's testimony that he spoke to legislative committees and civic clubs concerning funding levels for GCI, the Court finds that he absolutely ignored the criminal justice remedies to which he had ready access on behalf of his charges.

85. While the independent Inspector General, offices of David Brierton were called upon in such matters as the Barrett and Dixon investigation, Turner never called upon that office to conduct any investigation into assaultive behavior by inmates or any rapes that occurred. (Turner).

86. Peters conducted investigations at GCI only when directed by Superintendent Turner. (Peters). Turner never requested an investigation of the rapes of David Aldred, Martin Saunders, or Billy Joe Harper. (Turner). Each of the three Plaintiffs had reported to other prison authorities that they were raped (Saunders, Pg. 1563); (Aldred, Pgs. 812-815); (Harper, Pg. 746); however, because there was no discernable process to inform the higher chain of command at GCI, neither Aldred nor Saunders were ever interviewed by Lt. Peters.

87. Beyond the availability of the staff of the Inspector General's Office, Superintendent Turner failed to avail himself to other possible investigative arms of the government. While Turner referred all litigation to the Attorney General's Office, he never requested investigative assistance through the offices of the Attorney General. (Turner) Although there was some testimony that Lt. Peters had sought criminal prosecution from the State

Attorney's Office of Palm Beach for various matters, it appears that no request other than the single rape prosecution was ever made for criminal activity involving rape. (Peters) Additionally, there was no evidence that Defendant Turner ever attempted to personally meet with officials of the State Attorney's Office in order to develop a meaningful protocol of procedure and policy in which to involve the State Attorney Office in various criminal investigations at GCI. Finally, while the Federal Bureau of Investigation investigated at least one matter, its investigative offices were never requested by Superintendent Turner in order to conduct investigations of violations of inmates' civil rights under the various federal criminal statutes.

88. The fact that no investigations of rapes occurred is demonstrated by the conspicuous absence of any reference to rapes in the reams of internal documents analyzed by Dr. Swanson. (Swanson, Pgs. 150-151), P.Ex. 31.

(3) INMATE MOVEMENT CONTROLS

89. During the Turner administration, inmates had free ingress and egress throughout the compound and dormitories. As stated previously, inmates were able to crawl under the fence fronting the protective confinement cell area and harass or threaten those inmates housed in protective confinement. The Prison Inspector Report of September 19-21, 1983, (P.Ex. 6, Pg. 8), notes that inmate movements from one location to another are *not* properly controlled nor supervised by staff.

90. The control of inmate movement, particularly in an institution such as GCI with a high number of close custody inmates (65% to 75%) (Turner) and in an open dormitory setting, would make the necessity for some limitation on inmate movement critical.

91. Not until October 15, 1984, when Defendant Music became Superintendent at GCI, was a pass control system utilized to monitor the movement of inmates (Swanson, Pg. 137), (Music).

(4) STATIONING OF OFFICERS

92. As previously reviewed, due to the physical structure of the dormitory, an officer stationed in the wicket cage did not have a clear view of other areas of the dormitory because of clothing and other personal possessions that inmates kept on their bunks, *supra*, § 62. Additionally, during the Turner administration double bunking existed in the middle level of bunks, *supra*, § 34. Finally, because of the location of the shower area, it was impossible for an officer to view activities occurring in the shower from the wicket. (Swanson, Pg. 113) ("You cannot see back to the shower area for the obstruction of the bunks and the property piled on top of the bunks.") (Swanson, Pgs. 317-318) (Difficult if not impossible for officer in wicket to see shower area; double bunk in middle row obscures vision from wicket.).

93. Notwithstanding these obstacles, Defendant Turner never initiated any administrative policy that officers patrol the dormitory on a regular basis. Turner testified that he could not recall disciplining; suspending; or ever reprimanding an officer for failing to patrol the

dormitory area. Lt. Peters recognized that it would take an officer approximately ten minutes to walk throughout the dorm and agreed that if a rape took more than ten minutes in the shower area, then an officer properly on patrol would walk into the area of the shower while the rape was in progress.[23]

94. Following Turner's retirement, Superintendent Music removed the second bunk level in the middle row of the dormitories and restricted the placement of personal property, sheets and lockers on the bunks in the dormitories in order to eliminate the obstruction of the officer in the wicket. (Swanson, Pgs. 128-129).

(5) TRANSFER OF THE WOLVES

95. It is instructive to compare Superintendent Turner's practice in managing the transfer of aggressive assailant "wolves" who assaulted, extorted and sometimes raped more vulnerable inmates with that of his successors, Jones and Music.

96. Aggressive wolves appeared to be tolerated rather than transferred out of GCI; these assailants were allowed to recruit and prey on vulnerable inmates. (Swanson, Pgs. 51, 202). Turner articulated his helplessness in removing the wolves from damaging and violating other inmates (Turner). Attentive review of the facts in considering two areas of evidence reveals Turner's deliberate indifference to his responsibility to protect more vulnerable inmates.

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[23] Durrance's rape lasted 35 to 40 minutes (Durrance, Pg. 461). Aldred's rape lasted 15 to 20 minutes (Aldred, Pg. 810).

97. *First*, in his short stay at GCI interim Superintendent Jones (August 1, 1984 – October 15, 1984) shipped out six busloads of problem inmates. (Swanson, Pgs. 134, 202). In each of his first six months as Superintendent Music effectuated monthly five negative transfers (a rejection of an inmate assigned to GCI). (*Ibid.* Pg. 203). Additional inmates were "swapped" or exchanged by Music. (*Ibid.* Pg. 130). These efforts were not made by Turner. The unrebutted opinion of Turner's Chief Investigator, Peters, as to this matter is clear and revealing:

> When asked how Superintendent Jones could do this [transferring known inmate assailants] when it seemed not to be possible for Superintendent Turner, Lieutenant Peters said perhaps you have to understand Superintendent Turner's background. He did not seem to see this kind of inmate as a problem in the institution. I then asked if the problems are being understaffed, there was a chronic understaffing, would the high turnover have let Mr. Turner to dismiss problem staff. Lieutenant Peters said if you work with a chain gang for 30 years, you define problems with a different perspective. (Swanson, Pg. 134)

98. *Second*, a more empirical review of three known inmate "wolf-assailants" is equally informative. The first, Larry Pryor, had harassed plaintiff Martin Saunders and raped him in the bathroom in the Classification Building. *See, infra*, ¶ 151-153. Subsequently, Pryor also stabbed Plaintiff Eddie Cobb. *See, infra*, ¶ 177. The following chronology is revealing:

CHRONOLOGY CONCERNING LARRY PRYOR

DATE	DOCUMENT	COMMENT
January 21, 1983	Parole Report	Pryor "reflects" a serious pattern of assaultive behavior."
March 1983		Pryor rapes Martin Saunders. (*infra*, ¶ 153).
November 15, 1983	Classification[24] Team at GCI	"The team recommends transfer of the above mentioned inmate for security reasons. We have received information that inmate Pryor is actively involved in strong arm tactics . . . " [I]nmate Pryor assaulted inmate Kinner while taking these items.

[24] Turner testified that in regard to transfers, "I depended upon the classification team, that was their job." Turner obviously did not adhere to the classification teams' decision in the case of Larry Pryor.

December 29, 1983	Computer message from GCI	Cancelling scheduled transfer of Pryor from GCI to UCI.
January 27, 1984		Pryor stabs Eddie Cobb (*infra*, ¶ 177)
October 15, 1984		Music becomes Superintendent
November 10, 1984		Pryor transferred to FSP incident of November 12, 1984 (less than *one* month after Music becomes Superintendent)

[*Source:* P. Ex. 26 (Pryor Inmate File); (Swanson, Pgs. 157-159).]

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99. The second assailant, Willie Dock, was transferred out of GCI on September 6, 1984 (P.Ex. 16, Tab B) (Swanson, Pg. 155), for "management and security reasons." This occurred only *one* month after interim Superintendent Ron Jones replaced R.V. Turner. Just several months earlier in March, 1984, Willie Dock gang-raped Ronald Durrance. *See, infra,* ¶¶ 132-133.

100. The third assailant, Levi Fisher, was involved in homosexual activities with young white males. (Peters). Lt. Peters testified that Fisher had assaulted

other inmates as well and knew Fisher to be a wolf.[25] Nonetheless, Fisher was left in the D-Dorm and raped Billie Joe Harper. *See, infra,* ¶ 162.

(6) THE PORNOGRAPHIC MOVIES

101. Hard-core pornographic video moves showing explicit acts of intercourse and anal penetration were shown on a regular basis at GCI. (Swanson, Pgs. 375-376) The movies were a trap. They were unsupervised. (Swanson, Pgs. 88-90). Sounds of inmates screaming and crying could be heard from the trailer. (Swanson, Pgs. 107-108). Plaintiff Bronson was forced to masturbate an assailant at knife point in the movie trailer. (Swanson, Pg. 77), (Bronson). *See, infra,* ¶ 144.

102. This Court has no hesitation in agreeing ~~with~~ Plaintiffs' experts that the showing of unsupervised pornographic movies at GCI is absolutely inappropriate and indeed would only serve to "maximize the possibility of sexual and other violence." (Caddy, Pg. 1267).[26]

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[25] Peters also acknowledged that he knew that Dock and Bone, who raped Ronald Durrance, were wolves.

[26] While Defendants witness Inspector Brierton was apparently non-committal as to whether he would permit video pornographic movies to be viewed which show explicit scenes of vaginal and anal penetration (Brierton, Pgs. 101-103), he did not hesitate in opining that he would investigate a movie event if inmates were heard moaning, crying or screaming. (Brierton, Pgs. 103-104).

Finally, it is noteworthy that Defendants did not offer a scintilla of evidence refuting that both the pornographic movies occurred and also that certain inmates were trapped into the

4. WITHIN THE CONTROL OF TURNER: THE LIMITED FINANCE ISSUE

103. Defendant Turner has presented evidence which focuses upon the inherent limitations within which he performed his duties as Superintendent at GCI. These limitations relate to the fiscal realities in attempting to comply with various constitutional norms. Turner articulated these limitations in describing two overriding problems during his administration. (1) the lack of staff, and (2) the physical plant. The Court is sensitive to the inherent financial problems incurred by Turner, or for that matter any higher level correctional official occupying the position of Superintendent at GCI. Limited financial resources however is not dispositive of Turner's potential liability in this case. Rather, the issue to be considered is whether "full compliance [of constitutional norms] is beyond the control of a particular individual and that individual can demonstrate that he accomplished what could be accomplished within the limits of his authority". *Williams v. Bennett*, 689 F.2d 1370, 1387-88 (11th Cir.1982).

104. The Court has made inquiry into this issue and is convinced that events were not beyond the control of Mr. Turner and that even in light of the financial limitations and realities in which he operated, his conduct fell short of accepted and prudent correctional practices.

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setting and apparently victimized in the movie trailer. *See*, Devitt and Blackmar, *Federal Jury Practice & Instructions*, 3rd Ed., Vol. 2, § 72.17 (1977) ("If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence in unfavorable to the party who could have produced it and did not.").

105. In support of this conclusion, the Court lists the following specific evidence which reflects practices which would cost *little* or *no* monies; which were either ignored or intentionally rejected by Turner, which were well within his administrative control, and which, when considered separately and in combination – the Court is convinced – would have minimized or eliminated the likelihood of rape and assaults of the various Plaintiffs at GCI.

(i) Turner's failure, at no cost, to reprimand, discipline, or suspend staff officers who failed to carry out the most elementary assignments such as regularly patrolling the dormitories, particularly in the evening hours, which would have minimized the opportunity for rapes and assaults to have occurred. *See, supra.*, ¶ 63.

(ii) Turner's overall laxity, with his staff insofar as evidence of minimal or no control through reprimands, discipline or suspension which allowed correctional officers to function with impunity in the face of wholesale extortions, free flow of contraband including weapons, drugs, and alcohol; and permitting sexual activities such as the pornographic video movies to occur thus creating a general lawless climate from which the natural and forseeable [sic] consequences were wholesale inmate assaults and rapes. *See, supra*, ¶¶ 61, 101

(iii) Turner's failure, at no cost, to control and direct his staff and inmate population to remove sheets, personal property, lockers draped on inmate bunks in order to provide

a clear unobstructed view for staff to monitor prisoner activities within the dormitories. This failure led to an officers' obstructive view of the dormitory and showers where rapes of Plaintiffs occurred. *See, supra,* ¶ 61.

(iv) Turner's rather shocking failure, at no cost, to promulgate and adhere to any meaningful process to investigate allegations of rapes and inmate assaults. This failure led directly to staff not reporting allegations of rape through the chain of command, *supra,* ¶ 63 (Aldred and Saunders); led to rapes never reported by line correctional officers; and further resulted in rapes not investigated with low cost procedures such as: (i) rectal examinations; (ii) polygraphic tests; (iii) psychiatric evaluations; and (iv) in depth interviews. *See, supra,* ¶ 82.

The consequences of these failures were that rapes remained uninvestigated and not prosecuted thus insuring a climate where an inmate assailant could sexually violate more vulnerable inmates with absolute impunity.

(v) Turner's failure, at no cost, to enlist the investigative and prosecutorial assistance of other branches of government to at least minimally make an effort to investigate and prosecute rapists and assaultive inmates. Available investigative resources never properly utilized include the ((i)) Palm Beach County State Attorney; ((ii)) Office of the Inspector General of Florida; ((iii)) the

Attorney General; ((iv)) the Federal Bureau of Investigation.[27]

(vi) Turner's failure unlike his successors to impose inmate controls, at no cost, on prisoner movement throughout the compound and dormitories. *See, supra,* ¶ 89.

(vii) Turner's failure, at no cost, to transfer known assailants out of GCI through requests to DOC; through informal "swaps" or by merely adhering to classification decisions. *See, supra,* ¶ 96. This failure allowed Larry Pryor to remain at GCI at the times that he raped Saunders and stabbed Cobb, *see, supra,* ¶ 98, and allowed Willie Dock to remain at GCI at the time he and others raped Durrance, *see, supra,* ¶ 99.

D. RAPE

1. OVERVIEW

106. In an effort to appreciate and address general principles concerning the issue of rape in prisons and most specifically, the dynamics of rape which is in part the subject matter of this lawsuit, the Court will review

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[27] No attempt was even made to enlist the assistance of any federal investigative or prosecutional body to address whether a federal investigation or prosecution could occur with regard to rapes and assaults against prison inmates at GCI. Title 18 U.S.C. § 241 makes it a federal crime for "two or more persons to conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."

and make general findings on this subject. These findings, in turn, will affect and further define other previous factual findings provided in this decision.

2. FINDINGS

a. CORROBORATION: DID THE RAPES OCCUR?

107. The obvious fundamental issue which necessarily must be resolved is whether the rapes of Plaintiffs and other inmate witnesses occurred.

108. Beyond the Plaintiff-inmate testimony, which this Court has intentionally reviewed with great care and factual precision, two additional corroborative avenues support the inmate testimony. This corroboration comes in the form of extensive expert testimony of Plaintiffs' experts. *First,* Dr. Richard Swanson, a correctional expert trained in both psychology and law (P.Ex. 34) (Curriculum Vitae), (Swanson, Pg. 3-18), utilized a multi-variate approach (*Ibid.,* Pg. 21) in drawing from essentially five independent sources of data to analyze Plaintiffs claims.[28]

109. *Second,* Dr. Glenn R. Caddy, a clinical psychologist, (P.Ex. 35), (Caddy, Pg. 1115-1128), with personal experience in treating rape victims and general research devoted to the issue of rape (Caddy, Pg. 1125), and also

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[28] This data, reviewed at great length, (Swanson, Pgs. 21-244) provided: (1) internal archival documents generated from GCI (*Ibid.,* Pgs. 21-29); (2) external documents generated from independent sources outside of GCI (*Ibid,* Pgs. 29-31); (3) interviews of Plaintiffs and inmate witnesses (*Ibid,* Pgs. 32-35); (4) interviews of correctional staff including Defendant Music (*Ibid,* Pgs. 35-36); and (5) a general tour of GCI. (*Ibid*).

experienced with treating and investigating matters concerning prisoners. (*Ibid.*, Pgs. 1125-1126), additionally corroborated the fact that in his opinion the Plaintiff rapes had indeed occurred.[29] (Caddy, Pgs. 1241-1246) This conclusion was based upon: (1) the integrity of each of Plaintiffs' separate emotional responses in recounting the specific incidents of their rape experience. (*Ibid.*, Pg. 1242) ("Those men who have been raped present essentially classic profiles of the consequences of rape.") Dr. Caddy observed that in his professional opinion it would be unlikely, *Ibid.*, ("I have no reason to believe") that the plaintiffs-witnesses could artificially construct the emotional state that he observed[30]; (2) the inference of integrity from the commonality of the reporting of rapes to him which provided internal consistency to the varied circumstances supporting the conclusion that rapes occurred. (*Ibid.*, Pgs. 1242-43); and (3) generally, *see infra* ¶ 198, that in the context of the accepted frequency of not reporting ("underreporting") of rape, coupled with the normal inmate disinclination to report.

110. Based upon these reasons, as well as the totality of facts discerned, not only from the Plaintiff-inmate

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[29] Dr. Caddy's investigation in this case included; (1) interviewing of the Plaintiffs and innate [sic] witnesses (Caddy, Pg. 1130); (2) administering an analysis of specific psychological tests (*Ibid*); (3) reviewing various internal GCI-DOC documents relating to the various Plaintiffs and Inmates (*Ibid*, Pg. 1131); and (4) reviewing of related professional literature in the field of rape. (*Ibid*)

[30] The general symptomology, discussed in greater detail as to each inmate reflects a post traumatic anxiety disorder consistent with rape syndrome (Caddy, Pg. 1244).

testimony, *infra*, ¶¶ 122-195, but the other findings, this Court concludes that the rapes and assaults alleged by the various Plaintiffs and inmate witnesses indeed occurred.

b. UNDERREPORTING

111. Both of Plaintiffs' experts confirmed the generally accepted principal that rapes typically are underreported.[31] (Swanson, Pgs. 150-154); (Caddy, Pg. 1243) (As much as 50% of female rape in the non-institutional context are not reported. Concludes that underreporting would be even higher within a prison.)

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[31] In the instant case, three of the five sexual assaults upon the plaintiffs *were* reported by the victims, but simply were not followed through on by the correctional officials. The two inmates who did not report their assaults, the raped Durrance and the abused Bronson, testified credibly as to their reasons for not reporting. The first, Durrance, acted out of fear and lack of confidence that it would serve any purpose (Durrance, Pgs. 465-471); the sentence completion test administered to Durrance reflected a fear of telling people what happened to him because of the great embarassment and discomfort of it (Caddy, Pg. 1224). Bronson did not tell because he had been warned not to, which warning he took to heart (Bronson, Pg. 700); additionally, he was aware of illicit dealings between his assailants and guards (*Ibid*, Pgs. 692 and 701).

Non-party witness Larry Brown testified that he did not tell a guard immediately after the rape because his assailants remained awake watching him from adjacent bunks (Brown, Pg. 845), but did tell a black guard the next day (*Ibid*, Pg. 847), and four days after the incident confirmed to Lt. Minor the lieutenant's assertion that Brown had "had a line as long as the dorm." (*Ibid*, Pg. 851).

112. Dr. Caddy's view of even greater underreporting of rape within a prison is based upon the inmate disinclination to report because they not only have to deal with the degrading and humiliating consequences of reporting as do citizens in the outside world but also may "dramatically increase rather than decrease the risks that they will be seen to be vulnerable people to be raped again." (*Ibid.*, Pg. 1243) Simply, the terror often survives the initial assault – once an inmate is raped, he is marked as a victim for repeated sexual assaults for the remainder of his imprisonment.

113. In accepting these findings of underreporting of rape at GCI, this Court is not alone.[32]

c. THE DEGRADATION OF RAPE

114. At the risk of finding the obvious, the Court deems it necessary, particularly in light of the requested damage award for the individual Plaintiffs and also in the context of Plaintiffs' request for general injunctive relief,

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[32] Courts have recognized the underreporting of rapes and sexual assaults within our prisons. *See, e.g., United States v. Bailey*, 444 U.S. 394, 426 n. 9, 100 S.Ct. 624, 643 n. 6, 62 L.Ed.2d 575 (1980) (Blackmun, J. dissenting) (If a kid who is raped tells the guards, "his life isn't worth a nickel"); *Martin v. White*, 742 F.2d 469, 473 (8th Cir.1984) (Statistics on inmate assaults reflect "merely the tip of the iceberg as many violent assaults never find their way into the record books."); *Doe v. District of Columbia*, 701 F.2d 948, 966 (D.C.Cir.1983) (Edwards, J., separate statement); *State v. Green*, 470 S.W.2d 565, 569 (Mo.1971) (dissenting opinion) *cert. denied* 405 U.S. 1073, 92 S.Ct. 1491, 31 L.Ed.2d 806 (1972) (Life of inmate of Missouri Training Center for Men who reports a rape not worth "a plugged nickel".)

to make findings as to the general nature of the violation of rape.

115. Defendants' own witness, Inspector Brierton expressed it plainly and with clarity (Brierton, Pg. 89). ("You have to look at rape as an assault"); Defendant Turner's opinion is equally forceful: "Short of being killed I could think of nothing worse happening in prison." (Turner).

116. The Court accepts these opinions and shares its view that rape is one of the most degrading events, short of death, that can occur in prison. It follows that any institutional practices than can minimize its occurrence must be faithfully and consciously followed and observed by all prudent prison administrators. The Court finds that terror stemming from fear of sexual assault cannot be reconciled with the penological philosophy of the American prison system, which "emphasizes a balanced combination of deterrence, incapacitation, rehabilitation, and retribution."[33] Society must not permit prisoners to inflict the sort of punishment on other prisoners that law and common decency forbid the State.

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[33] Federal Prison System, U.S. Department of Justice, Long Range Plan 1981-1985 (1981), in Bureau of Persons and the U.S. Parole Commission; Oversight Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 97the [sic] Cong. 1st Sess. 45 (1981) (quotation refers to the Federal Prison System.

d. THE NATURE AND CONSEQUENCES OF RAPE ENDURED BY PLAINTIFFS AND INMATE WITNESSES

(1) AN ACT OF VIOLENCE

117. The proof reflected, and the Court so finds, that the universal opinion of all witnesses – of both parties – is that rapes in a prison setting such as GCI are acts of violence, as opposed to sexual conduct.[34] (Brierton, Pg. 89) ("An issue of dominance.") ("So the difficulty is when you begin to talk about homosexual rape, you have to look at the rape as an assault."); (Turner) ("An act of violence.") ("An act of violence even if victim has prior consentual relations with other inmates).

118. It follows and the Court finds that due to its very nature as acts of violence, the rapes that occurred are not isolated incidents of sexual conduct, but rather flow directly from the lawless prison conditions at GCI. Acts of inmate assault on inmates; inmate assaults by and upon correctional officers; an environment of free-flowing illegal activity involving extortion, possession of weapons, drugs, alcohol, and staff corruption; and the

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[34] Literature and research in the field support these conclusions that rape, at least in this context, is an assaultive and violent act rather than an event emanating from sexual gratification. *See, e.g.*, D. Lockwood, Prison Sexual Violence at 105-6 (1980); A. Scacco, *Rape in Prison* at 47 (1975); A. Groth, Men Who Rape – The Psychology of the Offender, 126-41 (1981) ("In this study of men who rape men, we found their dynamics to be similar to those of men who rape women. What is immediately apparent about the sexual assailants is that none of them had to rape for sexual gratification.").

corollary failure to punish or prosecute inmate-staff violators so that such assailants' and aggressors' conduct was not deterred by the rule of law and threat of punishment, all form the background and climate which in turn, provide a background and climate that preordained homosexual rapes and other inmate assault occurred.

(2) RACE

119. As described in detail, the named plaintiffs in this lawsuit, with the exception of Eddie Cobb, were all whites victimized by black assailants. *See, supra,* ¶¶ 122-190. *See also,* (Swanson, Pg. 287) (High percentages of blacks reported by Plaintiffs were the perpetrators.). Indeed there was no evidence presented by either party of any assaults by whites upon blacks; the pattern (other than Eddie Cobb) was consistently of black assailants assaulting whites (Swanson, Pg. 291).[35]

120. While one writer has concluded that there are definite "socioracial overtones" in the act of sexual victimization, noting that black aggressors who make whites submit to their sexual advances often comment "now it is

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[35] *See also,* (Swanson, Pg. 59) ("Glades is hard time for white inmates"); (*Ibid*) ("He [Pryor] describes the pressure of white inmates. In order to pressure white inmates, blacks will sexually assault a white or threaten such assaults. Thereby they can gain money for protection."); (*Ibid*) ("Pryor reports sexual assaults were always black upon white. Never white upon black."); (*Ibid,* Pg. 63) ("He [Eddie Cobb] reported that Glades was easy time for blacks. He reported that the blacks were the aggressors and the whites were pursued.").

their [the blacks] turn,"[36]; scholars, however, take pains to point out that "it is not black culture that is behind prison sexual aggression; rather, it is a criminal, male, youthful black subculture of violence." D. Lockwood, *Prison Sexual Violence*, at 105. Whatever the motive, the Court finds that any prisoner, especially one who is white and/or slightly built, may find himself threatened or raped even during the first day of confinement at GCI.[37]

(3) THE METHOD AND CIRCUMSTANCES OF PLAINTIFFS' RAPES

121. Additional factors underscore the injury and violation of the rapes of Plaintiffs.

a. Anal as opposed to vaginal rape has the "potential in some respects to do more physiological damage than vaginal rape largely because the anal sphincter isn't able to expand in the same way the vagina is able to expand." (Caddy, Pg. 1254). Hence, the necessity, on a routine basis, for rectal examinations obviously is a standard process utilized in investigating anal rapes. This did not occur at GCI even though the clinic was equipped with rape kits by the Palm Beach County Sheriff's Office. (Peters and Turner).

b. The use of a weapon by the assailant with the attending threat of possible death if submission does not occur tends to increase the

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[36] A. Scacco, *Rape in Prison*, at 48.

[37] Witness Larry Brown was raped the first evening he was transferred to GCI. *See, infra*, ¶ 190. David Aldred was raped the second day at GCI. *See, infra*, ¶ 123.

psychological trauma manifested from the rape.[38] (Caddy, Pg. 1253-54)

c. Multiple or gang rapes by numerous assailants elevates the "overall sense of total lack of control" and "almost inevitably will escalate the level of trauma experienced." (Caddy, Pg. 1256).[39]

d. Cross racial rape (i.e., black assailant – white victim), at least as to the research relating to women, tends to cause more trauma and violation than if the victim and assailant is one of the identical race. (*Ibid.*, Pg. 1258).

e. Rape occurring in an institution such as GCI provides less positive support services than if the rape had occurred outside of an institution. (Caddy, Pg. 1259-61). This is exacerbated by the negative rather than positive consequences of the reporting of rape within a prison. (Swanson, Pg. 151) ("Admitting of a rape puts at risk the inmate being labeled as involved in homosexual activity which may in fact put him in more jeopardy of the reoccurrence of that event.").

E. THE INDIVIDUAL PLAINTIFF'S CASES

1. DAVID ALDRED

122. David Aldred, 25, was found by Dr. Caddy to be suffering from post traumatic stress disorder as a

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[38] Each of the following Plaintiffs were raped at knife point: Saunders, *infra*, ¶ 153; Durrance, *infra*, ¶ 133; Aldred, *infra*, ¶ 123; and Harper, *infra*, ¶ 162.

[39] Each of the following Plaintiffs were gang raped: Saunders, *infra*, ¶ 153; Durrance, *infra*, ¶ 133; and Aldred, *infra*, ¶ 123.

result of his being raped by black inmates at GCI[40] (Caddy, Pgs. 1185-1186). Aldred arrived at GCI July 20, 1984. Immediately upon leaving the van, he saw 150 to 200 mostly black inmates pressing up to the fence and arguing with each other: "He's mine." "No, Nigger, I saw him first." "No, he's mine." (Aldred, Pg. 893). Aldred received no orientation at GCI other than an assignment to B-Dorm (*Ibid.*, Pg. 894).

123. The jeering at the fence presaged Aldred's being raped the second night he was at GCI. As he began to shower by himself, placing the washcloth to his face, he was hit aside the head, fell against the wall, and was thrown to the floor, face down. His arms were stretched out on either side. Someone grabbed Aldred by the hair and raised his head up to stick a knife beneath his throat, and told him in a voice that he recognized as belonging to a black: "If you open your mouth or holler, you will die." Aldred's legs were then spread and he was entered anally by either two or three inmates while the knife was held to

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[40] As with the other plaintiffs who were raped, Aldred was raped by blacks. Dr. Caddy testified that because these were cross-race rapes, they are even more substantial issues because they bear on the propensity of the victims to then come to believe that profound racism is entirely acceptable, which tends to carry with the victims for years afterwards, perhaps never to dissipate. Whatever problems that might create in an everyday world, it may be an even more difficult problem in prison (Caddy, Pg. 1246).

Significantly, Aldred described his arrival at GCI as being greeted by "a tidal wave of niggers fighting over who would have me" (Swanson, Pgs. 70-71). He characterized the camp in an interview as being "a black camp run by black inmates" and as being 80 per cent nigger."

his throat (*Ibid.*, Pgs. 808-809). The episode took 15 to 20 minutes (*Ibid.*, Pg. 810). Aldred experienced a burning, excruciating pain. He felt like he was being torn apart (*Ibid.*, Pg. 816). When his attackers had finished with him, they told him not to say anything (*Ibid*, Pg. 810). Aldred was bleeding from the rectum (*Ibid.*, Pg. 816). For a week, a sensation reminiscent of the rape returned each time Aldred had a bowel movement.[41] (*Ibid.*, Pg. 817).

124. After borrowing two knives and making an unsuccessful 45 minute foray throughout the dormitory looking and listening for any assailant who might be bragging about what had just happened, Aldred went to the dormitory officer and told him he had been raped (*Ibid.*, Pg. 813). The dormitory officer told Aldred to return to his bunk, that the officer would take care of it. Although Aldred said he had been raped, the officer did not arrange for him to receive a medical or rectal examination (*Ibid.*, Pgs. 812-813). After the shift changed at midnight, Aldred asked a new dormitory officer what was happening about Aldred's reported rape: the officer responded that he did not know what Aldred was talking about. (*Ibid.*, Pg. 814). The next day he reported his rape to a lieutenant. He said he did not know the identities of his assailants. He asked for protective custody. The lieutenant refused Aldred protective confinement. He told

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[41] Aldred's personality profile contains an elevated hypochondriasis scale. Dr. Caddy testified that this index is at least in part a reflection of the continued reporting that he experiences physical discomfort quite routinely in the rectal area if he has to strain to go to the bathroom, and even when he does not (Caddy, Pgs. 1173-1174).

Aldred words to the effect of, "You got to start being a man sometimes," (*Ibid.*, Pg. 815).

125. Although there is no Superintendent's Monthly Report to Regional Director for July 1984 included among Defendants' Exhibit 14, the one of the preceding month reflect an end-of-June population of 851 inmates and showed that 219 of the 235 authorized and established positions were filled. Superintendent Turner reported: "Inmate and staff morale continues to be good." *See*, D.Ex. 14. It is unknown whether Aldred's rape was reported as a sex assault on the July report, although it appears unlikely. The Court has been furnished with no written report of the rape by either the Plaintiffs, whose counsel represented that all pertinent documents concerning Aldred were contained in Exhibit 13, nor Defendants.

126. Aldred was transferred to the Reception and Medical Center (RMC) for previously scheduled dental surgery (*Ibid.*, Pg. 817). After the surgery was complete, Aldred said he spoke with a psychologist and told him the best that Aldred could [sic] what had happened at GCI, told him that Aldred needed help, and got the response that there was nothing the psychologist could do (*Ibid.*, Pg. 819).[42]

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[42] *See also*, P.Ex. 13, Section C (A medical chart, the second page of which contains an entry dated 7-25-84 that appears to read: "Patient feel [sic] afraid to [illegible] Glades C.I. He came for appointment with Dental Dpt. He request [sic] medication for his [illegible] ... . " Another entry of the same date reads: "Subject reported to the OPC attempting to elicit help in changing institutional assignment. He was referred to the Class.

127. Informed he would have to return to Glades, Aldred slashed his wrist with a razor blade. Dr. Caddy, while discounting it as a suicidal gesture that was probably an attempt largely to get attention, characterized it nonetheless as indicating clearly a grave state of distress (*Ibid.*, Pg. 1171).

128. Upon arrival back at GCI, Aldred immediately checked into protective confinement until he was transferred nine days later (*Ibid.*, Pg. 820).

129. As a result of the violent sexual attack that Aldred experienced at Glades, and the general flavor of his emotional state at the time, Aldred reported to Dr. Caddy that today he really doesn't trust anybody. He engages in almost a hypervigilant activity much of the time, and there is both a paranoid and phobic quality to his responding with respect to black males. He is very, very angry and continues to carry that anger hardly below the surface today. He goes everywhere that he possibly can with a weapon, which he reports never having done before the rape (Caddy, Pg. 1172). Aldred's sense is one of shame, being violated, almost uncontrolled anger and rage, and it seems to be distributed somewhat generally to black males, not simply specifically to the people who raped him. He classically demonstrates the profile of a rape victim, without any opportunity to engage in a therapeutic process (*Ibid.*, Pg. 1173).

2. RONALD LEE DURRANCE

130. Ronald Lee Durrance, a 27 year old father of two, had assumed by March, 1984, a role that Dr. Caddy

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Dept.").

characterized as "somewhat of a social worker" who informed transient inmates who passed through his dormitory at GCI of dangers of theft that they faced (Caddy, Pg. 1221). Durrance's adopted role at GCI appears especially benign when viewed against the backdrop of his earlier years in prison: he became a member of a gang, "The Omens," at DeSoto Correctional Institution in 1977 (Durrance, Pg. 518); he vended marijuana cigarettes at Florida State Prison in 1977, and was caught with 17 of them (*Ibid*, Pg. 519); he was disciplined at one work release program in 1981 for drinking and at another for lying to a staff member about his paychecks; he was convicted in 1983 of a burglary committed while on work release (D.Ex. 23). Notwithstanding such a past, however, Durrance is a strongly built man whose reporting to Dr. Caddy, as well as his prison file, revealed no difficulties at GCI prior to the incident of March 17, 1984 (*Ibid*), (Caddy, Pg. 1221).

131. Durrance reported to Caddy that he felt that the officers at Glades Correctional Institution seemed to have no control over the inmates or chose to exert none (*Ibid*). The institution at the time had filled 230 of its 235 authorized staff positions (D.Ex. 14, Superintendent's Monthly Reports to regional Director, Report for March, 1984). Defendant R.V. Turner had noted that: "Staff and inmate morale is good. No major problems to report." (*Ibid*).

132. On the night of March 17, 1984 (Durrance, Pg. 444), two black inmates known to Durrance as Willie Dock and Bull told him to cease warning the transients (*Ibid*, Pg. 446). Later that night another black inmate, J.R., said he wanted to speak with Durrance. Durrance walked

with J.R. to his bunk, the passageway next to which was obscured by having a blanket hung down from the top bunk. When Durrance stepped between the bunks to talk, Bull grabbed him by the neck (*Ibid*, Pg. 451). Willie Dock was there, too, with a knife. So was another inmate called Bone, also with a knife, and a fifth inmate, Bean (*Ibid*, Pg. 452). Willie Dock said, "Pussy cracker, if you holler, I'll cut you." He placed the knife to Durrance's neck and Durrance was dragged from between the bunks and into the shower (*Ibid*, Pg. 453).

133. In the shower, Durrance was thrown to the floor. As Bean knelt on Durrance's left shoulder and J.R. held a knife so that Durrance could see it, the others snatched off Durrance's blue prison pants and his underwear (*Ibid*, Pg. 456). They wrapped Durrance's pants around his neck and face (*Ibid*, Pg. 458). The first of the inmates to rape Durrance entered him forcefully through the rectum. Durrance wanted to scream, both because of the pain and because he could not believe what was happening (*Ibid*, Pg. 459). He was penetrated three times (*Ibid*, Pg. at 460). The ordeal lasted 35 to 40 minutes. When the rape was over, J.R. told Durrance, "Don't go to the wicket, pussy cracker. If you go to the wicket, you're through." (*Ibid*, Pg. 461). Durrance put his underwear back on. though not his pants, stood in the shower and cried (*Ibid*, Pg. 462). Although he flirted with the idea of revenge, Durrance calculated that he could not fight all of his attackers: he climbed back into his bunk, crying (*Ibid*, Pg. at 464). He was afraid to tell the dormitory officer about the rape because he felt that the dormitory officer would not do anything and that the other inmates would have heard Durrance complaining about which inmates

had raped him. He felt that he would have to name names to get into protective custody because of what he supposed was the "good cause" requirement (*Ibid*, Pg. 465). He lay awake all night (*Ibid*, Pg. 467). He watched his attackers lay awake on their bunks, smoking marijuana and drinking a prison made wine called "buck" (*Ibid*, Pg. 468).

134. When the shift change came, Officer Dixon came on at midnight (*Ibid*, Pg. 478). Durrance was afraid to tell Dixon because he had seen money passed between inmates and Dixon and had seen Officer Dixon deliver a pint of whiskey to an inmate (*Ibid*, Pg. 471).

135. In the morning, Durrance went to his job at the auto paint and body shop. His rectum was in pain, a burning sensation. He did not have a bowel movement until the next day. Notwithstanding the pain. Durrance was too embarrassed to seek medical attention (*Ibid*, Pg. at 472).[43] The pain, which Durrance described to Dr. Caddy as lasting several weeks, also continues in the form of lower stomach discomfort (*Ibid*, Pg. 1224).

136. Durrance did not return to work that afternoon. Instead, he went to see a lieutenant, but still could not bring himself to admit he had been raped. He was afraid that if he told, other inmates would find out (*Ibid*, Pg. 475). When he sought protective custody without saying why, a Lt. Slater told him, "The Confinement is full. I'm not putting you in confinement, and, look, go

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[43] Heightened embarrassment about the rape still showed through in a sentence completion test administered by Dr. Caddy (Caddy, Pg. 1224).

out, be a man; go out and learn to be a man." (*Ibid*, Pg. 476). Durrance ceased reporting to his job assignment because he knew that if he did not go to work, eventually he would be locked up in confinement and thereby be off the compound (*Ibid*, Pg. 477).

137. One of Durrance's attackers, Bone, he thinks, approached Durrance several days later and told him that he would either have to choose to be someone's sexual partner or to pay Bone protection money to avoid being raped again. Durrance stalled, continuing to fail to report for his work assignment (*Ibid*, Pg. 478). The unexplained refusal to work resulted in Durrance's receiving a disciplinary report and being locked up in administrative confinement (*Ibid*, Pg. 479). Although it was Durrance's first disciplinary report for refusing to work, the official who reviewed it did not want to hear any explanations (*Ibid*, Pg. 480). At the expiration of his 15 day confinement sentence (*Ibid*, Pg. 481), Durrance was assigned to a bunk in D. dormitory, about which he had heard that there was a lot of pressure there to engage in homosexual acts; he refused to go and was placed back in confinement (*Ibid*, Pg. 482).[44]

138. While awaiting a hearing on his refusal to go to D dorm, Durrance told acting Major Barrett that he had a problem about owing another inmate money and needed to be locked up in protective confinement. Barrett told him to write out a statement, which he did (*Ibid*, Pg. 484). Notwithstanding the explanation, Durrance lost 45 days

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[44] This behavior is consistent with Dr. Caddy's finding that, other than the fear that his son will find out about the rape, Durrance's greatest fear is being raped again (Caddy, Pg. 1225).

gain time for refusing to go to D-Dorm. *See*, D.Ex. 23 (Disciplinary Report reflecting hearing April 13, 1984).[45]

139. Durrance testified that he entered a statement that "I owed out a great deal of money, and I also entered the names of Willie Dock and Bull as the two people I owed, in hopes that maybe by me saying that I owed them, and it was felt that I was in danger, that they may be reprimanded somehow by me doing that."[46]

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[45] Durrance additionally lost 20 more days gain time that he would have acquired if protective custody inmates were allowed to work (Durrance, Pg. 486).

[46] Among the documents submitted from plaintiff, Durrance's file as part of Defendants' Composite Exhibit 23, was a handwritten statement dated 4/16/84 and purportedly signed by Ronald Durrance, which read:

> Dear Sir:
> I'm requesting protective custody because I owe out $60.00 that I have no way of paying. I would rather not give out names, but I have no other choice [sic]. Gator in [illegible] dorm Mark in C-dorm and a guy called Willie in B-Dorm. My life [illegible] in danger. Thank you.

Also in the file submitted by the Defendants is a Report of Administrative Confinement addressing the initial refusal to go to work. Under the section on Classification Team Review and Action, the report reads as follows:

> Team # 1 review [sic] inmate at approximately 7:00 a.m. on 4/3/84. Inmate Durrance advises that he owed inmate Stump some money while at U.C.I. three or more years ago and was transferred without paying. When Durrance arrived at G.C.I. he was met by Stump demanding payment. Durrance did not have the money ($40.00). Stump was released and transferred money to Willie Docks. [sic] Durrance borrowed money from Mark to pay Dock. Inmate is now threating [sic] to collect with interest. Durrance

140. Durrance never was raped prior to this incident, nor afterward. Nor has he engaged in any homosexual activity before or since (*Ibid*, Pg. 487). Nonetheless, and notwithstanding his initial concealment of the rape from prison officials, word of the rape circulated among prisoners and followed him to Polk Correction Institution, to which he was transferred in July, 1984 (*Ibid*). An inmate known as "Black" approached Durrance (*Ibid* Pg. 488) and told him that Durrance would either pay protection money to Black or Black was told to tell other inmates at Polk that Durrance was a "fuck boy" at GCI (*Ibid*, Pg. 489). On November 1, 1984, Durrance checked back into protective confinement at Polk, once again citing money owed as the reason (*Ibid*, Pgs. 490-491).

141. Durrance was transferred to Hendry Correctional Institution where, three weeks after his arrival, Bone, one of the assailants, approached Durrance and told Durrance that he was either going to have to pay Bone money or be somebody's "boy." Once again, Durrance checked into protective confinement (*Ibid*, Pg. 501). He said there was a contract on his life that had been let at Florida State Prison (*Ibid*, Pg. 502).

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expects to get an I.R.S. return to pay debt but want [sic] to go to Polk C.I.
Team # 1 does not feel this inmate is in fear but rather is engaging in manipulation to get a transfer. Team concurs [sic] with action taken; inmate is to remain in confinement for refusing to work until case is resolved.

142. September 27, 1985, Durrance was transferred – back to Glades Correction Institution (*Ibid*). He immediately requested protective custody, which he did not get until being required to go to the mess hall for lunch (*Ibid*, Pg. 503). At this point, he finally told a correction officer at GCI, Lt. Minor, that he previously had been raped (*Ibid*, Pg. 505). Lt. Minor memorialized the complaint in a Report of Administrative Confinement dated September 27, 1985 (D.Ex. 23). He remained in protective custody at GCI until bing [sic] transferred in November to Dade Correctional Institution (Durrance, Pg. 505).

143. The residue of the rape for Durrance, in addition to the gain time he has lost, created an adjustment disorder with mixed emotional features (Caddy, Pg. 1225). Emotionally, he reports being essentially closed and more reserved than before. He no longer seeks out people to be friendly, as he did before. He watches everybody and trusts no one. His greatest reported fear is telling his son about the rape (*Ibid*, Pg. 1225).

3. STEVE HERMAN BRONSON, JR.

144. Steve Bronson, a white, bisexual transvestite, who answers also to "Nancy Sue," arrived at GCI in November, 1981 (Bronson, Pg. 689) with a Department of Corrections file rife with reference to his sexual preference and affectation. *See*, Plaintiffs' Post Trial Submission of Excerpts from Plaintiffs' Records. Subsequent to his arrival, he encountered a black inmate gang leader named Mack, who trafficked in drugs, protection, gambling, alcohol, and homosexual prostitution. He met Mack while the two of them were in a trailer with others

watching a video cassette recording that depicted vaginal and anal intercourse. The movies were shown on weekends as part of the prison recreation program (Bronson, Pg. 691). Mack pushed a knife in Bronson's side and forced him to masturbate Mack (*Ibid*, Pg. 692). Despite Bronson's previous consensual relations with other males, he objected to being forced to masturbate Mack (*Ibid*, Pg. 694). Mack initially demanded that Bronson be one of his "girls," but settled for Bronson's agreement to pay him protection money and serve as a lookout during both card games and sexual encounters between the two other "girls" and guards (*Ibid*, Pg. 692). Bronson thrice observed guards being fellated by the homosexual prostitutes, once in the movie trailer, once in a dorm and once in the equipment shack on the recreation field (*Ibid*, Pg. 693). Another of Bronson's task [sic] for Mack was to masturbate inmates who paid Mack (*Ibid*, Pg. 696). To accentuate his femininity for this assignment, Bronson would dress in a tee-shirt rolled up above his midriff, shorts, and sandals (*Ibid*, Pg. 697). The only time he was required to wear his regulation uniform was to go to either the visiting park or the chapel (*Ibid*, Pg. 697) notwithstanding that he had once sued while incarcerated at another Florida prison to set aside a policy against wearing women's clothes (*Ibid*, Pg. 721).

145. In late June, 1982, one of Mack's two male homosexual prostitutes was transferred out and Mack demanded that Bronson take his place. After Bronson refused, he was waylaid by two men in Mack's company as he was walking across the recreation field at 9 a.m. or so on a sunny Saturday morning. A rag was stuffed in his mouth, his shorts and underwear were removed and the

handle of a baseball bat was shoved up his rectum, pushed a couple of times and pulled out. Bronson felt as if his rectum was being torn. When the bat was pulled out it was very painful. Bronson tried to scream, but could not. Mack told Bronson that the baseball bat was only a sample of what he would do if Bronson did not become one of his prostitutes. The rectal bleeding continued for three days (*Ibid,* Pgs. 698-699).

146. Bronson did not go to the clinic. He had been warned that he could be killed if he reported the incident to anybody. He believed that threat whole heartedly (*Ibid,* Pg. 700). He had witnessed guards giving money to inmates, Mack's buying alcohol from guards and Mack's buying drugs from guards (*Ibid,* Pg. 701). The drugs sold to Mack by the guards included marijuana, which Bronson recognized by seeing it as it was packaged for resale (*Ibid,* Pg. 702) and a white, granular substance with lumps that Mack said was cocaine and that Mack sold to other inmates when they asked for cocaine (*Ibid,* Pg. 703). Bronson told Dr. Swanson that black inmates ran GCI, (Swanson, Pg. 77). He also told Swanson that the guards seemed scared of inmates (*Ibid,* Pg. 78). He told Swanson he was scared to ask for protective confinement (*Ibid,* Pg. 79). He did not have the sense that there was anybody that he could go to (Caddy, Pg. 1191). When he finally did check in, he told Swanson he found it to be extremely punitive (Swanson, Pg. 81).

147. Bronson remained quiet about the incident. To avoid either a repeat or the alternative of forced prostitution, he checked into protective confinement immediately after a July 4, 1982 visit from his wife and daughter. Rather than inform on Mack, he used the ruse of family

problems instilling in him an urge to escape (*Ibid*, Pg. 710). He found his one-bed protective custody cell with two other inmates already there (*Ibid*, Pg. 711). The electric light was not working. The only times he was allowed outside was for three, three to five minute showers a week. There was no access to the law library. There were no canteen privileges. There was no smoking. The food was cold and in smaller portions than given to the inmates in population. The screens were either non-existent or had holes (*Ibid*, Pg. 712). Mack would come by the windows and tell Bronson to come out or he would send somebody in to harm Bronson (*Ibid*, Pg. 714). Superintendent Turner, however, never came back to the confinement area during the period that Bronson was there, from July 4, 1982 through August 25, 1982 (*Ibid*, Pg. 715).

148. Bronson was one of 80 persons who entered administrative confinement in July, 1982: the administrative confinement area had 34 inmates at the beginning of the month, 24 at the end. In June, when the baseball bat incident occurred, it appears as if 241 of the 270 authorized and established staff positions were filled.[47]

149. The psychological experiences that Bronson had at GCI simply represented a further extension of his increased sensitivity, his feelings of nervousness and his feelings of powerlessness (Caddy, Pg. 1190). But while Dr.

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[47] The monthly report for June appears to have a typographical error in its recitation of "231" jobs being filled: this becomes obvious when the figures for May (243) and July (247) are viewed against the minor turnover during the three-month period. In May, Turner had reported that the "high vacancy rate is down." (D.Ex. 14).

Caddy acknowledged that it would have been equally quite inappropriate to try to tease out the specific elements that relate solely to the incidents surrounding the events at GCI, he did feel it important to observe that at GCI Bronson felt far more vulnerable than at several of the other prisons in which he had been placed, largely because he perceived the facility to be somewhat more lawless (*Ibid*, Pg. 1191). Dr. Caddy's diagnosis of Bronson was as suffering an adjustment disorder with mixed emotional features, together with an atypical personality disorder and a sexual identification disorder; he could not attribute specifically what part of the disorder is a direct function of the incident at Glades (*Ibid*, Pg. 1193).

4. MARTIN SAUNDERS

150. Martin Saunders was convicted of sexual battery, for which he got a 35 year sentence; possession of marijuana, for which he got a concurrent 5 year sentence; and aggravated assault, for which he received a consecutive 5 years, for a total of 40 years (Saunders, Pg. 533). He is 5 feet, 7 inches tall and has an obese buttocks, a physiognomy that both he and Plaintiff Anthony LaMarca, who share it, say is attractive to imprisoned homosexuals (*Ibid*, Pg. 537), (LaMarca, Pgs. 948-949). How attractive Saunders was to the black inmates at GCI became uncomfortably clear to him as he witnessed a "great multitude" queue up near the area where the prison van unloaded him at GCI in February, 1983; he recalls feeling like being in a meat market (Saunders, Pg. 536). Although he earlier had been derided as a homosexual by one inmate shortly after having arrived at DeSoto

Correctional Institution, he attacked that inmate to rid himself of that label (*Ibid*, Pg. 534).

151. Although he received no orientation from the prison administration at GCI (*Ibid*, Pg. 539), he received an aggressive orientation the evening of his arrival in A-Dormitory; blacks approached this young white inmate offering friendship that he felt, based on the time he had spent in prison already, was a prelude to a homosexual advance (*Ibid*, Pg. 540). Two in particular, James Roper and Larry Pryor, were persistent in their advances and struck Saunders wherein he rebuffed them (*Ibid*, Pg. 541). Once, following a visit with his family, Saunders returned to the dorm where Pryor, armed with a knife, demanded that Saunders give Pryor the $5.00 his parents had just given him during the visit. Saunders complied then, as well as on a second occasion when Pryor demanded money (*Ibid*, Pgs. 546-547). On another occasion, Pryor and Roper "creeped" up behind Saunders as he watched television and each punched him on a side of his head (*Ibid*, Pgs. 549-550). They took his property and threw it in the shower (*Ibid*). He knew it was Roper and Pryor because he spotted a towel of his hanging from one of their bunks (*Ibid*, Pg. 551).

152. Saunders complained to a number of correctional officials. The officers took the approach that Saunders should be a man, should deal with his problems and should hit Pryor and Roper so that would leave him alone (*Ibid*, Pg. 548). According to Saunders' unrebutted testimony, one official, William Knight, Saunders' classification officer, took the opportunity of Saunders' first visit to press himself against Saunders from behind and

to run his hands down Saunders' arms. Saunders interpreted this as a homosexual advance (*Ibid*, Pg. 544).

153. On or about March, 1983, Saunders was using a small bathroom in the classification building. He was sitting on the commode with his trousers down when Roper and Pryor entered the room (*Ibid*, Pg. 551). The two told Saunders to keep his pants down (*Ibid*, Pgs. 551-552), and that they were going to "get theirs." It is a very narrow bathroom and Saunders was directed to stand over the commode, facing the wall.[48] As Roper lubricated his penis with Vaseline, Saunders attempted to bolt from the room, but was stopped and told that he would be killed if he tried again to escape (*Ibid*, Pg. 552). Roper entered Saunders. Saunders could tell that Roper ejaculated because of the groans he made. When Roper finished, Pryor followed (*Ibid*, Pg. 553). Pryor also ejaculated inside Saunders. The incident took about 25 minutes to a half hour. The two of them left the bathroom laughing about how, "That's some good pussy." (*Ibid*, Pg. 554).

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[48] Lt. Leo Peters, the institutional investigator, testified that the room in which Saunders said he was raped was so small that Peters bumped his head against the opposite wall one day recently while sitting on the commode. Dr. Caddy noted that when Saunders talked about being raped, he did not talk about being thrown to the floor, as had the others (Caddy, Pgs. 1311-1312). Saunders described his position during the penetration as "looking over the toilet, my hands on the wall," (Saunders, Pg. 553). The rapists, then, could have stood facing the commode much as a man would stand in front of it while urinating. In short, there is nothing in any of the testimony that is inconsistent with the conclusion that Martin Saunders was anally raped in the bathroom.

154. After sitting on the recreation field and crying alone for about an hour, Saunders angrily went in search of his rapists. When he found Pryor he began a fight. After the fight was broken up, Saunders, according to his unrebutted testimony, told Lt. Pipta, that Pryor and Roper had raped Saunders (*Ibid*, Pg. 556). Saunders got the impression that Lt. Pipta did not believe him. Although Lt. Pipta had Saunders taken to the clinic for an examination concerning the fight, there was no rectal examination done (*Ibid*, Pg. 557). The officer who was escorting Saunders said, "that's not what we're here for." Saunders was put into administrative confinement. In neither Saunders' file, pertinent excepts [sic] of which are include [sic] in P.Ex. 29, nor in Pryor's file, pertinent excerpts of which are included in P.Ex. 26, is there any record of either the report of the rape, of the fight, of the physical examination of Saunders, or of Saunders' subsequent confinement. Saunders' unrebutted testimony is that Pryor and Roper were not confined concerning the rape. There were no disciplinary reports concerning the fight (*Ibid*, Pg. 561). Lt. Leo Peters, the institutional investigator, testified that no one informed him of the alleged rape nor instructed him to investigate it.

155. Saunders, who reported experiencing a "very mushy" stool during his first bowel movement after the rape (*Ibid*, Pg. 559), was jailed as the third person in a two person cell. The cell was roach infested and there was a thick mildew on the walls. Saunders was there for three to four days (*Ibid*, Pg. 561).

156. Upon his release from confinement, Saunders acquired a transfer to C-Dorm by giving up a prestigious inmate job as a steward in the staff dining room (*Ibid*, Pg.

564) and taking a job cutting sugar cane (*Ibid*, Pg. 565). In C-Dorm, however, he encountered an inmate known as Charles Street, who harassed Saunders sexually and kicked him in the groin. *See*, P.Ex. 29, Section B. Street slept next to Saunders and told Saunders that he was going to "get" him one night. Saunders was fearful that Street would succeed in any attack because his bunk was obscured from the view of the dormitory officer (*Ibid*, Pg. 569) by towels that would be draped from the top bunk to form a sort of tent (*Ibid*, Pg. 570). Saunders felt someone who was thinking about killing him at night would feel that they could get away with it and, therefore, would be further motivated to harm him (*Ibid*, Pg. 570). The only way Saunders could see the guard was to hang his head over the bed perimeter (*Ibid*, Pg. 571). If Saunders were in his bed, the guard could not see him (*Ibid*, Pg. 572).

157. Saunders' fear of death upsets him greatly (Caddy, Pg. 1207), and he testified that his nightmares about death always involve a stabbing (Saunders, Pg. 577). Notwithstanding Saunders' being characterized by the Plaintiffs' own expert, Dr. Glenn R. Caddy, Ph.D., as being not only one of the most intelligent, but also most manipulative of the Plaintiffs (Caddy, Pg. 1198), Caddy testified that Saunders reports some of the common experiences of people who have experienced rape: an immediate sense of worthlessness but with extreme anger; a fear that in some respects he was trash for having allowed this to happen (*Ibid*, Pg. 1199). Dr. Caddy, whose experience in dealing with manipulative personalities include numerous clinical encounters with alcoholics and drug users, nonetheless placed credence in Saunders' testimony that he had been raped and felt that Saunders

would have been unable to consciously mimic the affect of a rape victim (*Ibid*, Pg. 1313). Dr. Caddy's diagnosis of Saunders is that of post traumatic stress disorder (*Ibid*, Pg. 1207).

158. During his imprisonment at GCI, Saunders told his mother repeatedly that he was in fear of his life (Sally Saunders, Pg. 658). Mrs. Saunders attempted numerous times during Saunders' incarceration at GCI to telephone Superintendent Turner. *See*, P.Ex. 12, Section A. She was only able to get through to him about three times, however (Sally Saunders, Pg. 669). During one of those conversations, subsequent to Saunders having joined as a Plaintiff in this action, Turner laughed and said to Mrs. Saunders, "Do you know how many people have tried to sue me?" (*Ibid*, Pg. 660).

159. Saunders checked back into protective confinement November 10, 1983. *See*, P.Ex. 29, section B. At the time, 220 of the 233 authorized and established staff positions at GCI were filled; Superintendent Turner wrote that "[s]staff & inmate moral (sic) appears high. Gov. Graham's visit was an important occasion. With overall unemployment down we are beginning to again experience significant staff vacancies." Saunders was one of 76 persons who went into either administrative or protective confinement during the month. His assault by Street, however, does not appear to have been reported as either an Unarmed Assault Where Person Assaulted is Injured, or as an Assault to Commit a Sex Act, no incidents having been reported in either category on the Superintendent's Monthly Report to Regional Director. *See*, D.Ex. 14.

160. Saunders found the conditions the same when he checked into protective confinement as those that existed when he was in confinement following the fight with Pryor (Saunders, Pg. 574). Notwithstanding the strictures of § 33-3.082(4), Florida Administrative Code, and GCI's Institutional Operating Procedure 83-40, which require that treatment of inmates in Protective Confinement be "as near that of the general population as assignment to protective confinement as the housing area will permit" (P.Ex. 3, Flap F 2), there was no literature, no canteen; in short, no privileges (Saunders, Pg. 574). Saunders never saw superintendent Turner during Saunders' stay in protective confinement (*Ibid*, Pg. 576). That stay ended when Saunders' was transferred to Avon Park Correctional Institution – at the order of a prison inspector (*Ibid*, Pg. 576).

5. BILLY JOE HARPER

161. Billy Joe Harper is an unusually boyish-appearing 25 year-old inmate serving a 15-year sentence for a sexual battery committed in 1985 following an earlier conviction for armed robbery (Harper, Pg. 732). His incarceration within the Department of Corrections has been characterized by incidents in which contemporaneous reports reflect that he had complained of sexual assaults and/or harassment and had requested protective confinement for those and other reasons.[49] The other assaults of

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[49] According to documents contained within D.Ex. 15, Harper sought an [sic] obtained protective custody at Brevard Correctional Institution January 12, 1980 because of the presence there of a jail rapist against whom he claimed to have testified in

which he is quoted as complaining all occurred prior to Harper's arrival at GCI on December 31, 1981.

162. About two weeks after his arrival, Harper was raped at Knifepoint in his top bunk in D-Dormitory about 2:00 a.m. by a man whom he identified as inmate Levy Fisher (Harper, Pg. 736). Fisher held a knife to Harper's throat and told him that if he made a sound, Fisher would cut Harper's throat (*Ibid*, Pg. 738). Fisher pulled off Harper's underwear and lifted Harper's leg so he could enter him anally (*Ibid*, Pg. 739). Harper could not see the correctional officer who was supposed to be on duty (*Ibid*). After Fisher was finished, he told Harper that if Harper told anyone, Fisher would kill him (*Ibid*, Pg. 740).

Leon County, Florida, Circuit Court. He told a correctional official at Avon Park Correctional Institutional [sic] March 1, 1981, that three black inmates raped him in the shower there February 28, 1981. Harper now does not remember making this allegation (Harper, Pg. 752). There is a notation on a "Page 8" of what appears to be a document from Baker Correctional Institution in which Harper is quoted under the "comments" section as having complained of being raped in the Alachua County Jail in Gainesville by someone who was then at Baker. Harper testified that he never made that statement (Harper, Pg. 750). Page 3 of what appears to be a document from Tomoka Correctional Institution prepared sometime subsequent to his arrival date there of September 13, 1984 alludes to a "prior statement" in which Harper acknowledged "sexually molesting" his own sister. A psychiatric report dated January 31, 1981 at Reception and Medical Center Hospital also noted that, "[a]ccording to his records, the patient practiced incest with his half sisters."

Other documents within Defendants' Exhibit 15 also recite that Harper has sought protective custody on several other occasions on the grounds of owing money and having been identified as a witness against other inmates.

163. Harper testified that he checked into protective custody the morning after the rape, telling officials that he wished to do so. He said two other inmates checked in with him. One of the inmates was Larry Turly. Larry Turly told the officers that they were checking in to get away from Fisher (*Ibid*, Pg. 741).

164. About three days after the three inmates checked in, Superintendent Turner called them to the office of the confinement area (*Ibid*, Pg. 745). Former inmate Greg Zatler also was called to the meeting (*Ibid*, Pg. 746). Zatler testified that "Superintendent Turner asked us why we were in confinement, and we told them because of Fisher." Turner replied, according to Zatler, "No, you couldn't be in here because of this inmate. This is one of our best inmates." (Zatler, Pg. 795). Harper recalls telling Turner that Fisher had raped him, to which Turner replied that Harper was lying and could rot in his cell (Harper, Pg. 746). Harper could not understand why Turner "wasn't there to get on Levy Fisher, he was there to get on us." (*Ibid*, Pg. 747).

165. No documentary evidence has been introduced to establish that either Harper or Zatler was in protective confinement in January 1982. However, corroborative of their joint testimony that they were concurrently in protective custody are letters written February 21 and 26, Zatler to Carl Kirkland, a prison inspector, concerning property that he had lost upon checking into protective custody February 11, 1982 (P.Ex. 5). Among the papers submitted by Defendants as composite Exhibit 14 (Page 34) is a Department of Corrections Daily Record of Segregation showing that Billy Joe Harper was in "P.C."

March 1, 1982 through March 8, 1982. Page 34 of Defendants' Exhibit 14, is a Disciplinary Committee Visit sheet that reflects a visit to Harper March 2, 1985 by a committee that included "Floyd, Turner, Arline" and resulted in a notation: "Continue A/C – Attitude poor."

166. Harper remained in protective custody until another inmate, Andrew Jackson, enticed him back on the compound with the proposition, voiced through a window of the confinement area, that Jackson would protect Harper on the compound for $10 a week (*Ibid*, Pg. 744). Lt. Leo Peters testified that he later in 1982 sought out Harper as a witness against Jackson in a criminal prosecution for extortion. *See also*, P.Ex. 20, Section B.

167. Dr. Caddy found Harper to be significantly depressed and exceedingly angry (Caddy, Pg. 1229). He diagnosed him as suffering from an adjustment disorder with mixed emotional features (*Ibid*). Knowledge of the earlier purported sexual relations would not have changed the basic diagnosis as to Harper. While such knowledge would influence. Dr. Caddy's judgment about the possible apportionment, it would additionally raise the question of preexistent elements that were exacerbated at Glades rather than provoked solely at Glades. Harper's additional, non-rape history did not bear on the legitimacy or veracity that Harper offered with respect to the matter of rape, according to Dr. Caddy. However, it did or could bear on the issue of the extent to which Harper now – in retrospect – seeks to focus much of his experiences in protective custody on the question of rape as opposed to other dynamics that also may have been operating within the man (*Ibid*, Pg. 1291).

168. As to the possibility of Harper's having been raped before Glades, assuming that rape is a statistically remote occurrence, the issue presented by the second rape is not simply an additive probability, but potentially represents even a more substantial issue because of the credibility question that many others would attribute to the individual, as well as the very special problems that the individual, himself, would have faced in the everyday world. Dr. Caddy's view is that a person who has been raped elsewhere, and then is raped at Glades, is in more need of assistance than he would have been if he had been raped on one occasion (*Ibid*, Pgs. 1301-1302).

6. EDWIN JOHNSON

169. Edwin Johnson arrived at GCI in February 1983 (Johnson, Pg. 1068). About the fourth week after arriving, Johnson received a visit from his mother. Sensing a large crowd of black inmates who he feared might attempt to rob him since there was only one guard patrolling the compound (*Ibid*, Pg. 1070) Johnson took a detour back to his dormitory, but was accosted 15 feet from the door by a black inmate with a knife who told him that he, Johnson, had one week to either "find you a daddy" or go into protective confinement (*Ibid*, Pg. 1078).

170. When Johnson told his classification officer about the ultimatum, he was told to either go into protective confinement or get a pipe or a knife and fight back. Johnson did not want to fight back because he was nearing parole and was attempting to overcome an earlier eight-year extension he had earned (*Ibid*, Pg. 1079). Johnson chose to check into protective confinement (*Ibid*, Pg.

1084). He shared a one-man protective custody cell with two other men (*Ibid*, Pg. 1085). There were no privileges for inmates in protective custody (*Ibid*, Pg. 1088). During this time there was no gymnasium access for protective confinement inmates (*Ibid*, Pg. 1089). There were no programs, such as education, that could have assisted Johnson toward obtaining a parole (*Ibid*, Pg. 1088). Thus, on the advice of the lawyer representing him in connection with the parole, he checked out of confinement after two and one-half months (*Ibid*).

171. Johnson stayed out of confinement for about two weeks until he was bloodied in a fight with inmates who stole some of his property; the fight occasioned his being taken to be interviewed by Lt. Lawson (*Ibid*, Pg. 1094). Johnson declined to name his attackers because he was afraid to be a "snitch" (*Ibid*, Pg. 1095). The next day, one of his attackers, who stood at about 6 feet, one inch tall, and weighed 225 pounds again attacked Johnson, who is 5 feet 11 inches tall and weighs 140 (*Ibid*, Pg. 1096). After that fight, Johnson sought a dormitory change from Lt. Lawson, but was denied it. He then checked back into protective confinement for three days (*Ibid*, Pg. 1097).

171a. By this point, Johnson had acquired a reputation as a weakling because he had twice checked into protective confinement (*Ibid*, Pg. 1099). Five inmates in the dormitory to which he was assigned put a blanket over him and beat him. Johnson checked back into protective confinement the next day (*Ibid*, Pg. 1100). The conditions and lack of privileges were the same, except that the confinement inmates were allowed to go to the gym (*Ibid*, Pg. 1101). The gymnasium party was composed of both administrative and protective confinement

inmates (*Ibid*, Pg. 1102). As they returned to the confinement area, one of the administrative confinement inmates hit Johnson in the head with a metal stool (*Ibid*, Pg. 881).[50] Johnson received five stitches and was hospitalized for two weeks. He returned to the protective confinement cells where he waited until the prison inspector ordered Johnson and Plaintiff Saunders transferred.

172. The exact dates of Johnson's presence in protective confinement or within the hospital are impossible to pinpoint. No incident reports concerning his alleged injuries, no administrative confinement reports and no medical records have been presented to the Court, notwithstanding Plaintiffs' counsels' having subpoenaed all of Johnson's records and representing to the Court that they had furnished all relevant records. Neither has the Defendants' counsel offered any records that conflict with Johnson's testimony.

7. WAYNE JOHN EPPRECHT

173. Wayne Epprecht, who is presently serving a sentence of life plus 130 years at Avon Park Correctional Institution, previously was incarcerated at GCI under an earlier commitment (Epprecht, Pg. 627). In February 1981, after having been visited by his sisters and having received $25.00 in cash from them, he returned to his dormitory, paying off various debts along the way. By the

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[50] The court reporter transposed volumes of the transcript. The volume beginning with a cover sheet numbered 879 follows that volume beginning with a cover sheet numbered 1001. The citations are to the pages as they appear.

time he arrived, he had paid out all but 26 cents. This paucity angered two black inmates who were waiting in the dorm to rob him (*Ibid*, Pgs. 628-629). One of them hit him in the face with a pipe. Epprecht did not see any correctional officers in the wicket at the time of the assault (*Ibid*, Pg. 629).

174. Epprecht went to a mirror and saw that the left side of his face was stoved in and blood was running out of his nose (*Ibid*, Pg. 630). He encountered an officer outside of the dorm. The officer took him to the prison hospital, where a nurse said Epprecht needed to go to Glades General Hospital (*Ibid*, Pg. 631). After several days at Glades General, Epprecht was transferred in a van with other prisoners to the Reception and Medical Center at Lake Butler. During the eight to ten hour trip he was in pain and given nothing to drink in connection with his liquid diet (*Ibid*, Pgs. 634-635). After surgery, Epprecht was returned to GCI (*Ibid*, Pg. 638), where he saw the two inmates who attacked him (*Ibid*, Pg. 650). They told him they would leave him alone if he would not say anything (*Ibid*).

175. Epprecht was asked several times what had happened to him (*Ibid*, Pg. 633), but he never had identified his assailants to officials because he felt it was safer not to "snitch" (*Ibid*, Pgs. 630-631). Superintendent Turner, however, was not one of those officials who inquired of Epprecht. While at GCI, Epprecht feared for his safety in a different manner than he had while serving time in other Florida prisons (*Ibid*, Pg. 645). At the other prisons, it seemed to Epprecht that an inmate could get help more quickly than at Belle Glade (*Ibid*, Pgs. 645-646).

176. In February, 1981, the time at which Epprecht was attacked, 222 of the 266 established and authorized staff positions were filled. Superintendent Turner reported, "we are currently holding 35 positions vacant at this institution to attempt to keep our salary allocation in good shape." (D.Ex. 7). The prison population ranged from 801 at the beginning of the month to 787 at the end. Superintendent Turner noted that "[t]he increasing number of inmates demanding protective confinement takes up most of the available space." (*Ibid.*).

177. Epprecht's psychological scarring was less than some of the other plaintiffs. Dr. Caddy diagnosed him as suffering from an adjustment disorder that was rather moderate in nature, was not severe, with some mixed emotional features (Caddy, Pgs. 1148-1149). However, according to Alan M. Wagshul, M.D., a Board certified neurologist, after examining Epprecht and reviewing his medical charts, Dr. Wagshul reports that Epprecht is suffering both reparable and irreparable injuries. The history of left facial trauma, with a fracture of the zygomatic arch and residual palpable deformity, is consistent with the sensory deficit in the area of the facial trauma. In layman's terms, Epprecht suffers from a numbness that forever will be exacerbated by prolonged chewing or changes in the weather and, while it can be alleviated by non-additive drugs, cannot be eliminated. Additionally, Epprecht suffers from probably a temporomandibular joint dysfunction that is consistent with his subjective complaints of headaches and pain upon chewing. While Epprecht has complained of suffering these symptoms

since the incident, February 14, 1981, they could be eliminated by an office visit to a dentist for a realignment of his bite (Wagshul).

8. EDDIE COBB

178. Eddie Cobb, the only black among the named plaintiffs, is a 24 year-old former inmate (Cobb, Pg. 764) who was stabbed in the head and arm (*Ibid*, Pg. 767), January 27, 1984 by fellow inmate Larry Pryor (*Ibid*, Pg. 765). Cobb received 18 stitches in his head and 12 in his arm at the prison hospital (*Ibid*, Pg. 768). His arm carries a visible scar, which the Court saw (*Ibid*, Pg. 767), and there is scar tissue on his head (*Ibid*, Pg. 768). Since the incident, Cobb experiences pounding, migraine headaches and dizziness, sensations about which he complained to prison health officials at Union Correctional Institution (*Ibid*, Pgs. 769-770).

179. Although Cobb had a number of fights at Glades in which he arguably could be cast as the aggressor, Pryor was the attacker in this instance (Deposition of Larry Pryor, Pg. 18), (Testimony of Lt. Peters). Pryor, however, was operating with the protection of Lt. William Barrett (Deposition of Larry Pryor). And after Cobb left the hospital, he was taken to administrative confinement (Cobb, Pg. 769), where he remained until he was transferred to Union Correctional Institution March 15, 1984. *See*, P.Ex. 15, Section C (Department of Correction Daily Records of Segregation for Eddie Cobb from Feb. 6, 1984 to March 15, 1984). Pryor was released before Cobb was transferred (Cobb, Pg. 769), notwithstanding the fact that

Lt. Peters' investigation revealed Pryor to have been the aggressor (Testimony of Peters).

180. A review of inmate Pryor's prison file reveals repeated documentation of his assaultive nature. A January 21, 1983 memorandum from the Florida Probation and Parole Commission discusses Pryor's "serious pattern of assaultive-violent behavior." An in-house classification team at GCI November 15, 1983 recommended "transfer of the above-mentioned inmate [Pryor] for security reasons." Although a transfer of Pryor to Union Correctional Institution was sought, the transfer request was withdrawn January 29, 1985. *See, supra,* ¶ 98.

9. MICHAEL GORDON

181. Michael Gordon arrived at GCI in late 1983 or early 1984 (Gordon, Pg. 897). He arrived there the least pre-institutionalized of the named plaintiffs. This was the first permanent assignment within the Florida prison system for Gordon. At the time, Gordon, a 41-year-old jeweler who lived in Plantation, had been sentenced to 25 years in prison for credit card fraud. *See,* P.Ex. 19, Section A. This conviction was subsequently overturned because of incompetence of defense counsel. *Gordon v. State,* 469 So.2d 795 (4th DCA, Fla.1985). Gordon suffered physically at GCI, perhaps less than any of the other named plaintiffs. He was knocked unconscious once while standing in front of the canteen. (Gordon, Pg. 907). According to x-rays taken three days later, there was no fracture from this injury (*Ibid,* Pg. 908). His buttocks were burned when inmates who had been drinking "buck" set his polyester underwear on fire (*Ibid,* Pg. 909); he was hit in

the head with a pipe in a robbery in which his mock Rolex watch was stolen (*Ibid*, Pg. 910).

182. Notwithstanding the fact that Gordon's complaints pale next to those of his co-plaintiff rape victims, Gordon's reaction to life at GCI was such that he lost 100 to 150 pounds (Gordon, Pgs. 916-917), (Caddy, Pg. 1159), and reports that it was the only time in his life when he seriously considered suicide (Caddy, Pg. 1163).

183. While at GCI, Gordon overheard the screams of a homosexual rape (Gordon, Pg. 900), found himself in an environment where blacks controlled a camp where the recreation centered on drug use, drinking and homosexuality (*Ibid*, Pg. 901), and was was [sic] extorted by a guard who one day appeared at the prison with a photograph of Gordon's wife and children (*Ibid*, Pg. 902). Gordon perceived the entire environment as anarchistic and without any constraints (Caddy, Pg. 1163). His wife reports that he talks in his sleep and yells, that he clearly experiences night terror that awakens him, and that he reports to be dreaming about incarceration at Belle Glade and being attacked and feeling vulnerable (*Ibid*, Pg. 1164). Gordon is suffering from an adjustment disorder with mixed emotional features, some anxiety, and some depression (*Ibid*).

10. ANTHONY LaMARCA

184. Although Anthony LaMcarca [sic] was never homosexually raped or seriously injured in an assault while he was incarcerated at GCI starting in late 1980 or 1981, his complaints concern the lengths to which he had

to go and the conditions he had to endure to avoid such a fate (LaMarca, Pg. 947).

185. First, he escaped on April 13, 1981. According to the Escape and Recapture Report, the reason stated for LaMarca's escape was that he was unable to pay money owed on the compound. LaMarca was threatened by an inmate skilled in the martial arts black belt the morning of his escape that if he didn't begin paying the black belt $25.00 per week beginning that same day, LaMarca "would see St. Peter that afternoon when I come in from work." (*Ibid*, Pgs. 955-966). An additional six months in the Palm Beach County Jail was added to LaMarca's sentence for the escape (*Ibid*, Pg. 957).

186. Homosexual solicitation and harassment began upon LaMarca's arrival at GCI in the form of catcalls from a line of black inmates, LaMarca being referred to as a "fat skinny white boy." This term meant that he was a frail youth (150 pounds) with a large posterior, which was sexually attractive (*Ibid*, Pgs. 948-949). One inmate in particular, Kenneth Storys, informed LaMarca on LaMarca's third day of incarceration at GCI that LaMarca should pick either Storys or someone like him as a "daddy" or he would be unable to live on the compound (*Ibid*, Pgs. 950-951). LaMarca did not seek protective custody for about a year after his arrival because he was embarrassed to be in this vulnerable position (*Ibid*, Pg. 994). When he did seek help and identified three inmates who were harassing him, these three inmates were not locked up for investigation. Indeed, following his meeting with officials, the three inmates came to the back door of the canteen and threatened LaMarca by telling him, "We know you snitched, cracker." (*Ibid*, Pgs. 961-962).

Three days later one of the three inmates swung a bat at LaMarca. He complained to Lt. Barrett about the situation. Lt. Barrett responded by giving LaMarca a pocket knife. When the inmate attempted to steal some marijuana that LaMarca was "breaking down" on the dormitory floor, LaMarca stabbed the inmate in the hand (*Ibid*, Pgs. 964-966).

187. At 2:30 a.m., after LaMarca stabbed the inmate, this same inmate along with two other inmates, came to his bunk demanding sex. They [sic] inmates carried a bush axe (*Ibid*, Pgs. 969-971). LaMarca ran to the wicket and sat in front of it all night, clad only in his underwear. No conversation transpired with the guard (*Ibid*, Pg. 972). The next morning, when LaMarca was found bringing a fiberglass sledgehammer into the dormitory for protection, he was given a disciplinary report (*Ibid*, Pg. 973).

188. In July, 1981, LaMarca checked into protective custody (*Ibid*, Pg. 974). Three men occupied a two-man cell. LaMarca had no privileges. When he complained to an officer, he was told to go back to the compound (*Ibid*, Pg. 975). Four months later LaMarca transferred out of protective custody rather than be transferred to Union Correctional Institution (*Ibid*, Pg. 976).

F. THE LARRY BROWN INCIDENT: BEYOND TURNER

1. THE RAPE OF LARRY BROWN – THE CONTINUED LACK OF AN ADEQUATE INVESTIGATION

189. Larry Brown is somewhat of an eleventh Plaintiff in this 10-plaintiff case. The only plaintiffs' witness who presently is incarcerated at GCI, and therefore a

member of the class seeking declaratory and injunctive relief, he is the only inmate who testified for Plaintiffs who was not himself seeking damages.

190. Brown arrived at GCI in June, 1985, was assigned to A-Dorm without any orientation (Brown, Pg. 839), and by 2:30 a.m. the next day (*Ibid*, Pg. 840) was ordered at knifepoint by three blacks to get out of his bunk and into one beneath it. He was told to lay down and not to scream (*Ibid*, Pg. 841). As one inmate held a knife to his throat, another removed his blue prison-issue pants and his undershorts, and penetrated him (*Ibid*, Pg. 842). He was anally raped five times, a knife at his throat throughout (*Ibid*, Pg. 843). When it was over, he went to the bathroom, with three of his assailants following him. They told him to say nothing about the rape or they would kill him (*Ibid*, Pg. 844). He returned to his bunk, as did they – one on each side of him and one beneath (*Ibid*, Pg. 845). The three rapists talked, smoked marijuana, and chatted all night long. Brown remained awake (*Ibid*, Pg. 846). Brown told a correctional officer the next morning that he had been raped (*Ibid*, Pg. 847), but the correction officer appeared disinterested (*Ibid*, Pg. 847). For the next few days, one, two, or three of the inmates followed Brown about (*Ibid*, Pg. 848). On the fourth day, Brown was taken to Lt. Minor's office (*Ibid*, Pg. 850) where Minor said, "I heard you had a line as long as a dorm." Brown told him what had happened (*Ibid*, Pg. 851). Minor told him he would put him in protective confinement if

Brown would give a written statement which he did[51] (*Ibid*, Pg. 852).

191. Brown attempted repeatedly to bring the matter to the attention of Superintendent Randall Music. His first communication, dated June 24, 1985, noted: "I would like to speak to you about the reason that I'm in protective confinement, which I'm sure you're well aware of at this particular reason." (*Ibid*, Pg. 859). Two days later, Brown wrote to Music a note that read as follows:

> I am sure that you're aware of what led me into protective custody. I would like to speak to you

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[51] Brown testified he arrived at GCI June 10, 1985 (Brown, Pg. 839), was raped during the predawn of the following day (*Ibid*, Pg. 840), and four days later was taken to see Lt. Minor (*Ibid*, Pg. 850). The earliest-dated record of any confinement, however, is the handwritten notation in the Classification Team Review and Action section of a Department of Corrections Report of Protective Confinement Form dated June 25, 1985, stating: "Inmate Brown was placed on A/C status 6-24-85 for bartering. I released him to population, but he wouldn't go. I recommend P/C status for investigation of his story." (D.Ex. 27, Flap B). Brown testified on cross examination that he had been in protective confinement before June 25 (Brown, Pg. 1018). The page in the exhibit immediately preceding the report quoted, *supra*, is a Transfer Order approving the shipment of Brown from the Reception and Medical Center to GCI. The Transfer Order is dated June 19, 1985. The credibility of his recollection of the rape incident, if not its precise day, is enhanced by the demeanor reported by Dr. Caddy during his interview of Brown. "Mr. Brown presented almost all of the testimony surrounding the sexual attack, and his subsequent feelings, both in tears and with such a level of emotional distress that virtually his entire body was constantly shaking for, and in fact continued to do so for a substantial period after the interview was completed." (Caddy, Pg. 1181).

> about this matter. I do not think it's fair for these inmates to escape this kind of incident. I have already tried to contact Classification[52] with no results. I hope that we can get together about this matter. This is my second request about this matter. The first was 6-24-85. (*Ibid*, Pg. 861).

A third and final writing addressed to Music was dated July 1, 1985, and read as follows:

> Good day. I would again like to request your time in a personal interview in your office as soon as possible. I know you're a very busily [sic] man and do not have time to spare, but this will only take a little of your time, also, please be aware that I have been trying to get in contact with the Classification Department without any results. Could you please look into this matter for me. I would like to know why there it is so hard to get to these people to talk to them. Please take action on this as soon as possible. Thank you. (*Ibid*, Pg. 863).

192. Brown received no response to any of these requests (*Ibid*, Pg. 864). The only response he has had to his rape is a one-hour meeting with a psychologist at

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[52] The June 21, 1985 request to Classification reads as follows:

> I'm sure that you're aware of the incident that took place in A Dorm. I would like to have the information on how to file a grievance in this incident. I also need the proper forms to do this. I thank you for assistance in this matter.

GCI. This is the only psychological counseling this inmate his received subsequent to the rape[53] (*Ibid*, Pg. 864).

193. No investigation by Lt. Peters was made initially of Brown's alleged rape (Peters), despite documentary evidence that the allegation was known to prison officials. A June 28, 1985 notation in the "Remarks Disposition" section of his disciplinary Committee Visit form that reads as follows: "Reviewed Status – Subject forced to commit sex acts and is unable to cope with pressures on the compound. Will rec. transfer and expedite. Continue P/C status. It is essential." (D.Ex. 22).

194. Brown was transferred to Hendry Correctional Institution July 12, 1985 (*Ibid*). Within about 30 days, other inmates who had been transferred from GCI had passed the word that Brown was "good pussy" (Brown, Pg. 866). Brown requested and received protective custody at Hendry August 9, 1985, after telling a guard lieutenant there that "I see (sic) that my life is in danger, because I have been approached by several black inmates about having sex with them, and I feel that if I don't they will attack me." (D.Ex. 22, Department of Corrections Report of Administrative Confinement dated August 9,

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[53] Although Brown is not a damage plaintiff in this action, Dr. Caddy, the Plaintiffs' expert clinical psychologist, nonetheless examined him and found him to have been terribly emotionally disordered as a result of the experience that he suffered at Glades, describing Brown's condition as one that Dr. Caddy feels Brown is going to have a great deal of trouble ultimately overcoming or resolving, especially in his present environment. His diagnosis of Brown was that Brown, as a result of the rape incident at Glades, suffers from post traumatic stress disorder (Caddy, Pg. 1183).

1985). Brown remained in protective confinement until September 27, 1985, when he was transferred back to GCI (*Ibid*, Pg. 868). Upon arrival, he immediately checked back into protective confinement. According to a Department of Corrections Report of Protective Confinement form dated September 27, 1985, and included among the papers in Defendants' Exhibit 22, Brown stated to Lt. E.L. Minor:

> [H]e fears for his life here, at Glades Correction. Inmate Brown stated he was sexually molested here a few months ago and was transferred to Hendry where he was also to be put into Protective Confinement due to being sexually harassed by inmates who were housed here and knew about his past . . . (*Ibid*).

On November 7, 1985, the Protective Confinement Review Team directed a memorandum to Superintendent Music, which memorandum is also included in Defendants' Exhibit 22, that read as follows:

> Inmate Brown, Larry W/M # 477709 was interviewed by the team on 11-1-85 with reference to his protective confinement status which began 9-27-85. He reports that he was sexually assaulted by an undetermined number of black inmates over the course of a week's time. He did not report it because he was afraid, and everywhere he went one of them followed and watched. He sought protective confinement, was traded to Hendry C.I., threatened there and checked in, and finally traded again back to Glades C.I. He states that one of the inmates who assaulted him was Johnny Jones of "A" Dorm. He claims he doesn't know any other names.

> We believe his protective confinement should continue, pending investigation of his allegations and possible transfer to another facility. (*Ibid*).

195. Lt. Peters has still not investigated Brown's allegations (Peters). The only transfer that has occurred concerning this inmate was his transfer from GCI to the Dade County Jail immediately before Thanksgiving pursuant to a Writ of Habeas Corpus ad Testificandum issued by this Court. Music's sole reaction to the missives directed to him by Brown was to observe that he wondered how thick Brown's file of copies would grow over the span of this 40 year sentence.

G. A FINAL WORD: THE FACTUAL INTEGRITY OF PLAINTIFFS' CASE

196. While the Court is not unmindful of the Plaintiffs' self interest in testifying, the credibility of Plaintiffs' testimony is evident from various independent reasons. *First*, the integrity of the plaintiffs' evidence is compelled by the dynamics of the way in which this case has developed.

197. These were not plaintiffs who came as a group to attorneys, seeking out counsel to prosecute a lawsuit. Rather, these were individuals who came forward after reading a class action notice posted throughout the prison system by Department of Corrections employees. Scattered throughout Florida's prison system, without the

opportunity to converse with each other about their separate, individual experiences at GCI,[54] these inmate plaintiffs did not come together prior to the trial in this action.

198. *Secondly,* while aware of the natural self-interest of any plaintiff in a suit for money damages, the Court is aware of various disincentives for these plaintiffs to

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[54] Dr. Richard Swanson, the Plaintiffs' first expert, testified that he had interviewed all of the plaintiffs, as well as Larry Brown, in preparation for the trial.

> I was also impressed by the heterogenity of the inmates I found.
>
> Recalling how the inmates were constituted into a plaintiff class, as I understand the sequence of events, once the complaint had been filed by the original plaintiff, LaMarca, the class was notified through a notice sent throughout the system.
>
> These people were then found by the attorney rather than them coming together and agreeing to file suit.
>
> These inmates, in no way that I am aware, had talked about this case one among the other, so I was impressed that this was independent information that had not been checked one with the other inmates.
>
> Most of these inmates did not know each other, and if they did, they had had (sic) not seen each other in a significant amount of time. (Swanson, Pg. 120).

Dr. Glenn R. Caddy, a clinical psychologist called by Plaintiffs as an expert, testified similarly:

> Secondly, there is an integrity that comes from a commonality of reporting of incidents where essentially ten people, none of whom either knew each other prior to going to Glades nor who knew each other in Glades, are in a position to provide information about common experiences that provide an internal consistency to the general arguments of the circumstances surrounding the locations of the rape and the nature and the incidence of the rape. (Caddy, Pgs. 1242-1243).

have testified as they did, especially for the rape victims. Not only has their demeanor on the witness stand reflected an obvious discomfort in publicly discussing their anal rapes, but the first of the plaintiffs' two psychological expert witnesses testified that the men were in similar, if not more pronounced, states of turmoil during the times that he interviewed them,[55] while the second characterized their interview behavior and verbalizations as consistent with their having been raped.[56]

199. In sum, this Court in convinced, by a combination of its having been able to view the witnesses and judge their credibility, and of its having heard from the plaintiffs' experts about the integrity that they separately

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[55] Dr. Swanson testified:

> In several occasions, and all of these occasions involved inmates who had reported being raped at GCI, there was obvious emotional tension, anxiety, tearful problems in the inmate reporting the incident. I was moved by how difficult it was for many of the inmates to talk about the rape process itself. (Swanson, Pg. 119).

[56] Dr. Caddy testified:

> These men were raped . . . Those men that have reported being raped present essentially classic profiles of the consequence of rape. I have no reason to believe that any of them have anywhere near the sophistication in my discipline to be able to, a priori, construct for themselves the sort of emotional state that would be necessary to maintain the integrity of that argument under circumstances where a person who has had a fair degree of training in this area is confronting them in a relatively confronting interview set about the circumstances of these incidents. (Caddy, Pg. 1242).

found during their investigations, that the plaintiffs told the truth when they testified about events which occurred while they were incarcerated at GCI.

1. CONCLUSIONS OF LAW

a. THE DAMAGE CLAIMS

(1.) OVERVIEW

(a) SCOPE OF FEDERAL JUDICIAL INVOLVEMENT

200. At the outset, this Court recognizes that "[t]raditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration." *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). These problems are "complex and intractable . . . they are not readily susceptible of resolution by [judicial] decree. Most [prisons] require expertise comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Id.* at 405, 94 S.Ct. at 1807.

201. However, this court is also mindful that "[c]ourts certainly have a responsibility to scrutinize claims of cruel and unusual confinement . . . When conditions of confinement amount to cruel and unusual punishment, 'federal courts will discharge their duty to protect constitutional rights.' " *Rhodes v. Chapman*, 452 U.S. 337, 352, 101 S.Ct. 2392, 2402, 69 L.Ed.2d 59 (1981). citing *Procunier*, 416 U.S. at 405-06, 94 S.Ct. at 1807-08); *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 3198, 82 L.Ed.2d 393 (1984) (The Court has "repeatedly held that prisons are not beyond the reach of the Constitution."),

Id., ("[W]e have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.").

(b) EIGHTH AMENDMENT PROHIBITIONS

202. The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishment"[57]. The former Fifth Circuit (en banc) has explicitly ruled that:

> Confinement in a prison where terror reigns is cruel and unusual punishment. A prisoner has a right to be protected from the constant threat of violence and from sexual assault. *Jones v. Diamond*, 636 F.2d 1364, 1373 (5th Cir.1981) (en banc), *citing Withers v. Levine*, 615 F.2d 158 (4th Cir.1980); *Gates v. Collier*, 502 F.2d 1291 (5th Cir.1974); *Woodhous v. Virginia*, 487 F.2d 889 (4th Cir.1973).

203. "When prison officials have failed to control or segregate prisoners who endanger the physical safety of other prisoners and the level of violence becomes so high . . . it constitutes cruel and unusual punishment." *Jones v. Diamond, supra*, 636 F.2d at 1374 citing *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir.) *cert. denied* 423 U.S. 859, 96 S.Ct. 114, 46 L.Ed.2d 86 (1975).

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[57] The Eighth Amendment's ban on cruel and unusual punishment was first made applicable to the states by virtue of the Fourteenth Amendment in *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

204. Indeed, in order to comply with the eighth amendment prohibition against cruel and unusual punishment, prison punishment must comport with "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976) (*quoting Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958)). Moreover, such punishment must not "involve the unnecessary and wanton infliction of pain." *Rhodes v. Chapman, supra*, 452 U.S. at 346, 101 S.Ct. at 2399 (*quoting Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (joint opinion)), which includes those punishments that are "totally without penological justification." *Id.* (*quoting Gregg v. Georgia, supra*, 428 U.S. at 183, 96 S.Ct. at 2929).

205. The various Circuit Courts of Appeal have uniformly ruled that "[s]ubjecting prisoners to violent attacks or sexual assaults, or constant fear of such violence, shocks modern sensibilities and serves no legitimate penological purpose." *See, e.g., Martin v. White*, 742 F.2d 469, 474 (8th Cir.1984).

(c) GENERAL STANDARDS OF LIABILITY

206. In order for prison officials to be liable under a § 1983 action based on a constitutional deprivation resulting from cruel and unusual punishment, there must be a showing that the prison officials' conduct constitutes a reckless or callous indifference to the rights and safety of the prisoners in his charge. *Williams v. Bennett*, 689 F.2d 1370, 1380 (11th Cir.1982) *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983) (Must allege "a conscious

or callous indifference to prisoners' rights"); *Miller v. Salem*, 728 F.2d 1020, 1024 (8th Cir.1984) (Reckless disregard of inmates' right to be free from violent attacks by fellow inmates); *Wade v. Haynes*, 663 F.2d 778 (8th Cir.1981) (Reckless disregard, gross negligence, callous indifference), *aff'd on other grounds sub nom Smith v. Wade*, 461 U.S. 30, 102 S.Ct. 1625, 75 L.Ed.2d 632 (1983) ("Reckless or callous indifference by prison officials sufficient to award of punitive damages."); *Stokes v. Delcambre*, 710 F.2d 1120, 1124 (5th Cir.1983) (Virtual indifference to the safety of prisoners.)

(2.) APPLICATION OF THE STANDARDS

207. At the outset, the Court recognizes that in determining whether or not Defendant Turner's conduct rises to a level of "conscious or deliberate indifference to [plaintiffs' need] for reasonable protection from violence," *Williams v. Bennett, supra*, 689 F.2d 1380, a variety of § 1983 liability elements interplay. While those elements or factors overlap to some extent and are otherwise difficult to disentangle, the Court nonetheless will review them for purposes of analysis in isolation. Nonetheless it is the sum of these factors when ultimately considered in totality which convinces this Court that Defendant Turner acted with deliberate indifference to Plaintiffs' needs for reasonable protection from violence. *Williams v. Bennett, supra.*

(a) ELEMENTS OF LIABILITY

(1) TURNER'S KNOWLEDGE OF A PERVASIVE RISK OF HARM

208. Somewhat intertwined and perhaps subsumed into the "callous or deliberate indifference standard" of

§ 1983 prisoner damage liability is the basic notion that the perpetrator (Defendant) knew or should have known of a pervasive risk of harm resulting in victim's (Plaintiffs) injury. *See, e.g., Roberts v. Williams,* 456 F.2d 819, 827 (5th Cir.1971) *cert denied* 404 U.S 866, 92 S.Ct. 83, 30 L.Ed.2d 110 (1972) (§ 1983 liability premised upon a "callous indifference to [inmate suffering] at the management level, in the sustained knowing maintenance of bad practices and customs."); *Patterson v. MacDougall,* 506 F.2d 1, 3-4 (5th Cir.1975) (Personal liability of Director of Corrections *both* because of his direct involvement and because of his failure to act when improper prison conditions were brought to his attention.); *Wright v. McMann,* 460 F.2d 126, 134-5 (2nd Cir.1972) (Warden held liable financially for damages to inmate where he failed to take corrective action in light of history of previous similar episodes.).

209. The Court has previously found that Defendant Turner in some instances *knew* and in other instances *should have known* of widespread illegal activities in general and risks of harm to inmates' security in particular.

210. Turner knew of general inmate security problems through: (1) *official documentation,* including (i) Turner's acknowledgment to DOC Secretary Wainwright that GCI was "out of control," *supra,* ¶ 38, and that staffing problems created a danger to the "staff *and* inmate population" (emphasis in original), (ii) the 1980 Palm Beach County Grand Jury presentment which recited "lax security precautions" and referred to a free flow of contraband at GCI including drugs, alcohol, gambling, theft, contraband, and extortion among inmates and personnel, *supra,* ¶ 40, (iii) the 1980 Inspecter General

Management report evidencing continuing security issues including unattended supervision of dormitories, *supra*, ¶ 42, (iv) the 1983 Inspector General Report evidencing continuing "disregard for established procedures," *supra*, ¶ 45; (2) *major incidents of staff corruption* including (i) the Lt. Barrett incident, *supra*, ¶¶ 46-50, and (ii) the illegal activities of Officer Dixon, *supra*, ¶¶ 51-52; and (3) knowledge of the free flow of contraband as evidenced by the reports of the *official documents* previously discussed; the activities of Lt. Barrett and Officer Dixon; and the general common reporting in other internal documents of inmates' possession of weapons, drugs, alcohol, and extortion activities.

211. It is less clear to distinguish between what Turner actually knew from what he *should have known*. The Court is convinced that a prudent administrator should have known – assuming Turner did not actually know – of: (1) widespread extortion activities of inmates such as Larry Pryor working in complicity with staff officers, *supra*, ¶ 53; (2) widespread rape and physical assaults on inmates given various objective and discernible indices such as (i) the general free flow of contraband, assaults, extortions and violence that permeated GCI prisoner life between 1980-1984, *supra*, ¶ 56, (ii) the consistent and disproportionate number of white inmates who "checked into" protective confinement which itself, due to its punitive conditions, should have – assuming that it did not – constituted a direct signal of inmate violence, *supra*, ¶¶ 73-74, (iii) the general wolfing and catcalls of aggressive black inmates who were vocally signalling vulnerable whites for future sexual attack, *supra*, ¶ 77, (iv) overt signs of sexual conduct evidenced by

hung sheets, inmates groaning in the bunks, and pornographic movies where inmate crying and moaning could be readily heard, *supra*, ¶ 78, (v) direct reporting of rape by certain Plaintiffs (Aldred, Sanders [sic], and Harper) which either were known or should have been known through a normal chain of command to Turner, *supra*, ¶ 79.

(2) CONDITIONS WERE WITHIN TURNER'S FINANCIAL AND ADMINISTRATIVE CONTROL

212. If full compliance with accepted constitutional practices "is beyond the *control* of a particular individual and that individual can demonstrate that he accomplished what could be accomplished within the limits of his authority, then he cannot be said to have acted with callous indifference." *Williams v. Bennett*, *supra*, 689 F.2d at 1387-1388 (emphasis added) *citing Scheuer v. Rhodes*, 416 U.S. 232, 247, 94 S.Ct. 1683, 1692, 40 L.Ed.2d 90 (1974); *Slavin v. Gurry*, 574 F.2d 1256, 1262 (5th Cir.1978). *See also, e.g., Chestnut v. City of Quincy*, 513 F.2d 91 (5th Cir.1975); *Madison v. Gerstein*, 440 F.2d 338 (5th Cir. 1971).

213. The element of "control" in *Williams v. Bennett*, *supra*, is measured both from inherent and financial limitations, *Ibid.* at 1387, "One such limitation may have been the funding available to comply with the constitutional norms" as well as more generally matters within an individual's administrative control.

214. The principle of proper management structure employed to reduce the likelihood of the tragedies that

have occurred in this case have been aptly described by the Chief Judge of the former Fifth Circuit:

> One of the critical elements is that the official demonstrate that he has employed efficient management principles so as to minimize the chance of error and maximize the likelihood of full satisfaction of constitutional and statutory obligations. *Bryan v. Jones*, 530 F.2d 1210 at 1216 (5th Cir.1976) (en banc) (Brown, C.J.) (concurring).

215. The Court has identified a series of administrative areas within Turner's managerial control which also impose no fiscal limitations as evidenced in part by corrective measures taken by Turner's successors. These include: (1) improper and inadequate staff training evidenced by gross problems with officers' handling of weapons carried to the extreme in the Barrett incident, *supra*, ¶ 46; (2) a staff out of control who did not report rapes, assaults, and illegal activities up through the chain of command, *supra*, ¶ 66; (3) the failure to supervise staff and administer measures which would "minimize the chance of error and maximize the full satisfaction of constitutional protection," *Bryan v. Jones*, *supra*, in (i) not stationing officers to patrol throughout the dormitories, particularly at night, and leave the wicket cage, and in (ii) permitting the obscuring of vision of the officers in the wicket by allowing inmates to hang sheets, blankets, their personal property, lockers and other materials resulting in the impossibility for officers to maximize the protection of inmates in the dormitory; (4) a shocking failure to employ any standard procedure to investigate incidents of alleged rapes, *supra*, ¶ 82; (5) the failure to request outside investigative or prsecutorial [sic] assistance to

otherwise make some even *minimal* attempt to deter raping sand assaults, *supra*, ¶ 84; (6) the failure to provide inmate movement controls thus reducing the casual egress and ingress of aggressive assailant wolves within the open dormitories, *supra*, ¶ 89; and (7) the failure to transfer know [sic] assailants or inmate who should have been known to be assailants out of GCI, *supra*, ¶ 86.

(3) NOT A SERIES OF ISOLATED INCIDENTS

216. By the nature of the Court's previous findings and conclusions, *supra*, ¶¶ 208-211 ("Turner's knowledge of a pervasive risk of harm") and ¶¶ 212-215 ("Conditions Were Within Turner's Financial and Administrative Control") the Court by implication already has addressed the matter, consistently urged by Defendants throughout trial[58], that Plaintiffs' claims for damages are merely ten separate isolated incidents. To the contrary, the Court already has discussed in detail the broad "pervasive risk of harm" and "conditions which were within Turner's financial and administrative control."

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[58] Additionally, Defendants in their Pre-Trial Stipulation maintain as an issue of law which remains for determination by the Court:

> 5. Whether Eighth Amendment protection, cruel and unusual punishment, *extends to isolated incidents of assault, robery* [sic] *and rape as alleged by Plaintiffs*. In absence of a showing that these Defendants acted in a manner of deliberate indifference to conditions that would shock the conscience of the ordinary person, Plaintiffs cannot recover under the Eighth Amendment. (emphasis added). (Pg. 13, ¶ 5).

217. Plaintiffs' claims stem from these far reaching and serious failures of Defendant Turner to properly manage and administer Glades Correctional Institution. *See, Bryan v. Jones, supra* 530 F.2d at 1216; *Donaldson v. O'Lane,* 752 F.2d 817, 828 (3d Cir.1984) (*en banc*) ("When officials with a possibility to prevent harm, such as prison officials, fail to establish or execute appropriate procedures for preventing serious malfunctions in the administration of justice, such failure would support a claim under § 1983)," citing, *Murray v. City of Chicago,* 634 F.2d 365 (7th Cir.1980), *cert. dismissed sub nom. Finley v. Murray,* 456 U.S. 604, 102 S.Ct. 2226, 72 L.Ed.2d 366 (1982).

218. In sum, Plaintiffs' claims are not isolated incidents. They stem from a far ranging and serious failure of Defendant Turner to properly manager [sic] GCI.[59]

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[59] Having found that Plaintiffs' claims do not represent ten isolated separate incidents, it is unncessary to decide whether in *Smith v. Wade,* 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) the Supreme Court, in affirming an Eighth Amendment violation relating to a single isolated incident has thus, *sub silentio,* repudiated the principle that an "isolated incident," by its very nature could never rise to the level of "callous indifference" rendering a prison official liability for acts that offend the constitution.

(4) BREACH OF A DUTY IMPOSED BY STATE LAW

219. A "supervisory defendant is subject to § 1983 liability when he breaches a duty imposed by state . . . law, and this breach causes plaintiff constitutional injury." *Williams v. Bennett, supra,* 689 F.2d at 1381; *Sims v. Adams,* 537 F.2d 829, 831 (5th Cir.1976); *Beverly v. Morris,* 470 F.2d 1356 (5th Cir.1972); *Hesselgesser v. Reilly,* 440 F.2d 901 (9th Cir.1971); *Scott v. Vandiver,* 476 F.2d 238, 241-42 (4th Cir.1973); *McDaniel v. Carroll,* 457 F.2d 968, 969 (6th Cir.1972); *see generally Roberts v. Williams,* 456 F.2d 819 (5th Cir.), *cert. denied,* 404 U.S. 866, 92 S.Ct. 83, 30 L.Ed.2d 110 (1971).

220. Under Florida law, as Superintendent at GCI, Defendant Turner was required to protect "the offender from victimization within the institution" and to develop "a system of due process and *internal legality* in the institution." 20.315(1)(c), Florida Statutes (1983) (emphasis added).[60]

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[60] Section 20.315(1)(c) provides as follows:

20.315. Department of Corrections

There is created a Department of Corrections.

(1) Purpose – The purpose of the Department of Corrections is to integrate the delivery of all offender rehabilitation and incarceration services that are deemed necessary for the rehabilitation of offenders and the protection of society. The goals of the department shall be:

(c) To provide an environment for incarcerated persons in which rehabilitation is possible. This *should include the protection of the offender from victimization within the institution* and the development of a system of due process and internal legality in institutions. (emphasis added).

221. The Florida statutory requirement contained in Section 20.315 provides Plaintiffs with "a clear legal right to be confined in an institution where they are free from victimization by other inmates" and places upon Defendant Turner "an equally clear legal duty to [have provided Plaintiffs] with such incarceration." *Graham v. Vann*, 394 So.2d 180, 183 (Fla. 1st D.C.A.1981) (Mandamus issued to compel the Department of Corrections to comply with legal duty to confine inmates in an institution where they are not victimized by other inmates).

222. As detailed herein, Defendant Turner breached his statutory duty under Florida law which caused Plaintiffs' constitutional injury.

(b) CAUSATION

(1) GENERAL STANDARDS

223. Our Circuit has clarified the principle that in prison damage actions of this nature, a "[C]ricital causation issue [here] must be whether each individual defendant was in a position to take steps that could avert the stabbing incident at Holman; but, through callous indifference, failed to do so." *Williams v. Bennett, supra*, 689 F.2d at 1384.

224. Of necessity, the Court in detail has reviewed the context of the general operational policies, practices, conditions and events existing at the general time Plaintiffs' claims arose, *supra*, ¶¶ 36-105; traced Defendant Turner's knowledge of these matters which the Court has concluded reflect a "pervasive risk of harm," *supra* ¶¶ 208-211; and reviewed these conditions demonstrating

that they were all within a prudent administrator's administrative and financial control.

225. Having faithfully adhered to our Circuit's guideline of resolving the causation issue which "necessarily entails a very individualized approach, taking into account the duties, discretion, and means of each defendant," *Williams v. Bennett, supra,* this court in addition has traced the factual details of each Plaintiff which led to their respective injury.

226. Turner's failure to properly and prudently manage GCI matters within his administrative and financial control is a *direct cause* of Plaintiffs' injuries. The exacting causation link required by *Williams v. Bennett,* has been amply proven and documented.

(2) PERSONAL INVOLVEMENT

227. It is now settled that in § 1983 actions public officials cannot be held vicariously liable for the wrongdoing of others. *Monell v. N.Y. City Dept. of Social Services,* 436 U.S. 658, 692, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). Thus Defendants are correct when they assert that misconduct by subordinates or third parties cannot be imputed under § 1983 to an official who played no role in causing a deprivation of constitutional rights.[61]

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[61] Defendants' position is set forth in their Pre-Trial Stipulation as an issue of law which remains for determination by the Court:

> 4. Whether Plaintiffs are entitled to recovery against Turner and Music under a theory of *respondent superior* which is not permissible under actions brought under 42 U.S.C. § 1983. (Pg. 13, ¶ 4).

228. However, this principle cannot be extended in an attempt to insulate public officials from § 1983 liability by requiring that in order to hold a public official responsible for a constitutional deprivation that official must have participated literally and directly, or must have been present at any of the Plaintiffs' rapes/assaults. According to this reasoning, § 1983 would preclude recovery against public officials where those officials directly contribute or cause a deprivation of constitution rights – although not present or directly participating in causing the injury – by merely exercising "callous indifference" in maintaining policies and practices which lead to that designation.

229. Such a proposition is in error; § 1983 only requires that there be a *causal connection* between the officials' conduct and the constitutional tort. It does not require direct personal contract or direct conduct by the Constitutional violation. *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961) (42 U.S.C. § 1983 constitutionally based claims "should be read against the background of tort liability that makes a man responsible for the natural consequences of his act."); *Williams v. Bennett, supra*, 689 F.2d at 1383 ("[S]ection 1983 plainly requires, a causal connection between the Constitutional deprivation and the defendant's acts or omissions"); *Sims v. Adams*, 537 F.2d 829, 831 ("§ 1983 requires a degree of causation as an element of individual liability, but it does not specifically require personal participation").

230. In sum, all that must be shown based upon these principles is that Defendant's conduct was a proximate cause of the Plaintiffs' injury. Plaintiffs have proved such causation in this lawsuit.

(3.) DEFENDANT TURNER'S GOOD FAITH DEFENSE AND QUALIFIED IMMUNITY

(a) THE STANDARDS

231. Even when prison administrators violate an individual's constitutional rights, they may enjoy a good faith immunity defense to § 1983 lawsuits when sued in their individual capacity for damages. *Scheuer v. Rhodes, supra,* 416 U.S. at 247-8, 94 S.Ct. at 1692 (1974); *Procunier v. Navarette,* 434 U.S. 555, 561-62, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978) (Qualified immunity applicable to protect prison officials); *Williams v. Bennett, supra,* 689 F.2d at 1385-86 (11th Cir.1982).

232. The parameters of this defense were clarified by the Supreme Court in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). There, the Court, while reviewing its previous qualified immunity decisions, recognized that the "good faith" defense has both *objective, Harlow v. Fitzgerald, supra,* 457 U.S. at 815, 102 S.Ct. at 2736, 73 L.Ed.2d at 408 ("The objective element involves a presumptive knowledge of and respect for "basic, unquestionable constitutional rights," *citing Wood v. Stickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975)), and a *subjective* aspect. *Id.* ("The subjective component refers to 'permissive intentions.' "). In refining these concepts, the Court concluded that government officials are shielded from liability for civil damages "[I]nsofar as their constitutional rights of which a *reasonable person would have known* (emphasis added) (citations omitted). *Harlow v. Fitzgerald, supra,* 457 U.S. at 818, 102 S.Ct. at 2738, 73. L.Ed.2d at 410.

233. *Harlow v. Fitzgerald, supra,* thus refines the qualified immunity defense to a consideration based upon *objective factors.* Our Circuit, in accord, has interpreted *Harlow* in such a manner. *Williams v. Bennett, supra,* 689 F.2d at 1385 ("Thus, objective criteria now govern the evaluation of a good faith defense.").

(b) BURDEN OF PROOF

234. Determinations as to the availability of the qualified immunity defense almost always will turn on an appreciation and analysis of the facts. *Imber v. Pachtman,* 424 U.S. 409, 419, n. 13, 96 S.Ct. 984, 989, n. 13, 47 L.Ed.2d 128; *Scheuer v. Rhodes, supra,* 416 U.S. at 238-9, 94 S.Ct. at 1687; and *Wood v. Strickland, supra,* 420 U.S. at 320-22, 95 S.Ct. at 1000. As an affirmative defense, the burden in proving the "qualified immunity" defense rests with the Defendant. *Gomez v. Toledo,* 446 U.S. 635, 640-41, 100 S.Ct. 1920, 1923-24, 64 L.Ed.2d 572 (1980).

(c) APPLICATION OF THE QUALIFIED IMMUNITY DEFENSE

235. There is "no serious question but at the time" these sexual assaults occurred, it was well-settled that a prisoner had a "clearly established" Eighth Amendment right to be protected from constant threats of violence. *Stokes v. Delcambre,* 710 F.2d 1120, 1125 (5th Cir.1983); *Jones v. Diamond, supra,* 636 F.2d at 1374; *Gulatte v. Potts,* 654 F.2d 1007, 1012 (5th Cir.1981) (Unit B); *Withers v. Levine,* 615 F.2d 158 (4th Cir.) *cert. denied,* 449 U.S. 849, 101 S.Ct. 136, 66 L.Ed.2d 59 (1980); *Gates v. Collier,* 501 F.2d 1291 (5th Cir.1974); *Woodhous v. Virginia,* 487 F.2d 889 (4th

Cir.1973); *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir.) *cert. denied*, 423 U.S. 859, 96 S.Ct. 114, 46 L.Ed.2d 86 (1975).

236. To the extent that good faith is defined essentially in objective terms, if Defendant Turner knew or should have known that his failure to take reasonable steps to prevent Plaintiffs from being sexually assaulted by other inmates violated Plaintiffs' rights under the Eighth and Fourteenth Amendments, then good faith will be defeated. The Court concludes that the law which requires a prison official with knowledge of a pervasive risk of harm to inmates under his charge to take reasonable steps to prevent that harm was "clearly established."

237. Thus, in the context of this case, the Court finds that Defendant Turner cannot claim that he did not know the constitutional standard since it was a "clearly outlined" right at all times relevant to this action and Defendant Turner's "qualified immunity" defense must fail.

(4.) DAMAGES

(a) OVERVIEW

238. Plaintiffs proceed against Defendant Turner in his individual and official capacity and seek monetary damages against this Defendant. Plaintiffs proceed against Defendant Music solely in his official capacity and seek only injunctive relief against this Defendant.

239. Plaintiffs' suit for damages under § 1983 against Defendant Turner in his individual capacity is not barred by the Eleventh Amendment to the United States

Constitution.[62] *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (Suit under § 1983 against state officials in their individual capacity not barred by the Eleventh Amendment, but the State official is entitled to defense of qualified immunity; *Ruiz v. Estelle*, 679 F.2d 1115, 1157 (5th Cir.1982) *cert. denied*, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983).

240. The Court is mindful that the judgment against Defendant Turner in his individual capacity for his actions as Superintendent of GCI will be paid by the State of Florida; in 1979 the Florida legislature enacted a statute in which the State agreed to pay for the full amount of a judgment against an employee of the State in "civil rights actions arising under 42 U.S.C. § 1983, or under similar federal statutes . . . unless the officer, employee, or agent has been determined . . . to have caused the harm intentionally" Section 111.071(1)(a), Florida Statutes (1983)[63]. *Shinholster v. Graham*, 527 F.Supp. 1318, 1336-1338 (N.D.Fla.1981).

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[62] The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state. U.S. Const. amend. XI.

[63] Section 111.071, Florida Statutes (1983) provides as follows:

> 111.071 Payment of judgments or settlements against certain public officers or employees (1) *Any* county, municipality, political subdivision, or *agency of the state* which has been excluded from participation in the Insurance Risk Management Trust Fund *is authorized to expend available fund to pay:*

241. However, this statutory provision which provides for the state to pay judgments against state employees arising out of civil rights actions does not constitute a waiver of the State's Eleventh Amendment remedy and thus damages can only be assessed against Defendant Turner in his individual capacity. *See, Williams v. Bennett, supra,* 689 at 1376-1378 (11th Cir.1982) (Similar

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(a) *Any final judgment including damages, costs, and attorney's fees, arising from a complaint for damages or injury suffered as a result of any act or omission of action of any officer, employee, or agent in a civil or civil rights lawsuit described in s. 111.07.* If the civil action arises under s. 768.28 as a tort claim, the limitations and provisions of s. 768.28 governing payment shall apply. *If the action is a civil rights action arising under 42 U.S.C. s. 1983, or similar federal statutes, payments for the full amount of the judgment may be made unless the officer, employee, or agent has been determined in the final judgment to have caused the harm intentionally.*

(b) Any compromise or settlement of any claim or litigation as described in paragraph (a), subject to the limitations set froth [sic] in that paragraph.

(c) Any reimbursement required under s. 111.07 for court costs and reasonable attorney's fees when the county, municipality, political subdivision, or agency of the state has failed to provide an attorney and the defendant prevails.

(2) For Purposes of this section, a "final judgment" means a judgment upon completion of any appellate proceedings.

(3) "Agency of the state" or "state agency," as used in this section, includes an executive department, a constitutional officer, the Legislature, and the judicial branch.

(4) This section is not intended to be a waiver of sovereign immunity or a waiver of any other defense or immunity to such lawsuits.

proviso in Alabama law which indemnifies employees for judgment does not constitute a waiver of Eleventh Amendment Immunity).

242. Accordingly, this Court in assessing whether monetary damages should be awarded to Plaintiffs will limit its consideration to whether damages should be awarded against Defendant Turner in his individual capacity.

(b) THE STANDARDS

243. The "policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson v. Wegmann,* 436 U.S. 584, 591, 98 S.Ct. 1991, 1995, 56 L.Ed.2d 554 (1978) citing *Carey v. Piphus,* 435 U.S. 247, 254, 98 S.Ct. 1042, 1047, 55 L.Ed.2d 252 (1977); *Mitchum v. Foster,* 407 U.S. 225, 238-242, 92 S.Ct. 2151, 2159-62, 32 L.Ed.2d 705 (1972); *Monroe v. Pape,* 365 U.S. 167, 172-187, 81 S.Ct. 473, 476-84, 5 L.Ed.2d 492 (1961). Section 1983 was intended to create "a species of tort liability" in favor of persons deprived of federally secured rights. *Carey v. Piphus, supra,* 435 U.S. at 253, 98 S.Ct. at 1046.

244. Under *Carey v. Piphus, supra,* 435 U.S. at 263-264, 98 S.Ct. at 1052, compensible [sic] damage may not be presumed but must be proven. However, the "injury in civil rights cases may be intangible" and "need not be financial or physical but may include damages for humiliation and emotional distress." *Stallworth v. Shuler,* 777 F.2d 1431, 1435 (11th Cir.1985) *citing Carey v. Piphus,*

supra, 435 U.S. at 263, 264 and n. 20, 98 S.Ct. at 1052, and n. 20.

245. The Supreme Court has recently recognized that "once liability is found . . . the [court] . . . is required to award compensatory damages in an amount appropriate to compensate plaintiff for his loss." *Smith v. Wade*, 461 U.S. 30, 52, 103 S.Ct. 1625, 1638, 75 L.Ed.2d 632 (1983) (§ 1983 action by inmate against prison guard for damages sustained from beatings and sexual assaults by other inmates).

246. Notwithstanding the fact that all of Plaintiffs' damages are not quantifiable with precision," their injuries nonetheless give rise to actual consequential damages. *Cortiz v. Naranjo*, 667 F.2d 892, 898 (10th Cir.1981) (§ 1983 damage award against law enforcement officials). Additionally, "real injury could be inferred from the facts" of each plaintiff's case. *Baskin v. Parker*, 602 F.2d 1205, 1210 (5th Cir.1979) (damages for humiliation and emotional distress appropriate in § 1983 action).

247. Other federal courts have consistently awarded damages to Plaintiff inmates whose Eighth Amendment rights had been violated. *See, e.g., Wade v. Haynes*, 663 F.2d 778 (8th Cir.1981) (plaintiff awarded $25,000 in compensatory damages and $5,000 in punitive damages against correctional officer for damages sustained in beatings and sexual assaults by other inmates), aff'd *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983); *Thomas v. Booker*, 762 F.2d 654 (8th Cir.1985) (plaintiff entitled to compensatory and punitive damages from defendant jail officials because of defendants' reckless disregard of plaintiff's right to be free from violent

attacks by fellow inmates); *Matzker v. Herr,* 748 F.2d 1142 (7th Cir.1982) (plaintiff stated a claim for compensatory and punitive damages from defendant jail officials because of their failure to reasonably protect him from violent attacks by fellow inmates); *Martin v. White,* 742 F.2d 469 (8th Cir.1984) (Prison officials were liable for compensatory and punitive damages where they acted in reckless disregard of inmates' right to be safe from assault by other inmates); *Stokes v. Delcambre,* 710 F.2d 1120, 1124 (5th Cir.1983) (plaintiff awarded $70,000 in compensatory damages and $310,000 in punitive damages against jail officials for damages stemming from a violation of his Eighth Amendment right to be reasonably protected from physical assault by other inmates); *Davis v. Hazen,* 582 F.Supp. 938 (C.D.Il.1983) (mentally ill inmate's estate held entitled to compensatory and punitive damages from jail officials whose actions led to the decedent being beaten to death by a fellow inmate).

(c) DAMAGES FOR EACH PLAINTIFF

248. Five of the damages plaintiffs are victims of rape. Two of those, David Aldred and Martin Saunders, were diagnosed by Dr. Caddy as suffering from post traumatic stress disorder[64] (Caddy, Pgs. 1185-1186 and

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[64] In the category diagnosed as post traumatic stress disorder, which is one of the profound anxiety disorder categories of the Diagnostic and Statistical Manual of Mental Diseases, Vol. 3, the essential feature is the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience. The characteristic symptoms involve re-experiencing the traumatic event, often a numbing of responsiveness to it or an excessive

1207). Ronald Durrance, in addition to the gain time he has lost, has suffered an adjustment disorder with mixed emotional features[65] (Caddy, Pg. 1225), as was Harper (*Ibid*, Pg. 1229). Bronson, who was penetrated with a baseball bat handle,[66] is suffering an adjustment disorder with mixed emotional features, together with an atypical personality disorder and a sexual identification disorder,

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responding to it; a reduced involvement with the external world; and a variety of what is known as autonomic reactions, physiogic reactions, dysphoric mood and cognitive symptoms (e.g., reactions of rage, reactions of humiliation, reactions oriented towards aggression against the perpetrator of a violent act like rape) (Caddy, Pgs. 1238-1239).

[65] The essential features of the adjustment disorder class, according to the Diagnostic and Statistical Manual of Mental Disorders, Vol. 3, is a maladaptive reaction to an identified psychological stressor that occurs within three months after the onset of the stressor. The maladaptive nature of the reaction is indicated by the impairment in social or occupational functioning or symptoms that are in excess of a normal and expected reaction to the stressor. The disturbance is not merely one instance of a pattern of overreaction, or an exacerbation of an already existent disorder. It is assumed that the disturbance will eventually remit after the stressor ceases or if the stressor persists, when a new level of adaptation is achieved. The new level is classically to be achieved only as a result of a natural remission that sometimes occurs in individuals, or alternatively as a result of a remission or reversal that occurs as a result of therapeutic intervention.

[66] § 794.011(1)(f), Florida Statutes (1983) provides as follows:

> "Sexual battery" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by *any other object;* however, sexual battery shall not include acts done for bona fide medical purposes.

although it is impossible to discern specifically what part of the disorder is a direct function of the incident at Glades (*Ibid*, Pg. 1193). Were the five rape victims, as well as the other plaintiffs that Dr. Caddy interviewed, to be treated outside of prison for the emotional distress resulting from the rapes, each would require an estimated $10,000 to $20,000 in therapy (Caddy, Pg. 1271). Four additionally testified as to the intense physical pain each felt upon being anally penetrated and for some time thereafter (Aldred, Pgs. 816-817), (Saunders, Pgs. 558-559), (Durrance, Pgs. 459 and 472), (Bronson, Pgs. 698-699). That each was experiencing extreme emotional distress can be inferred from their decision to check into, and to remain, in protective confinement where conditions can only be described as punitive (Caddy, Pg. 1265). Considering these factors, including that psychiatric and/or psychological services can and should be provided by the Department of Corrections, the Court hereby awards to each of the sexually assaulted plaintiffs a sum of Thirty Thousand Dollars ($30,000) in compensatory damages.

249. A second grouping of plaintiffs were not raped, but suffered physical injuries as a result of assaults. The most severely injured of these is Wayne Epprecht, whose cheek bone was fractured when he was struck with a lead pipe during a robbery. Epprecht, even following surgery, suffers from a probable temporomandibular joint dysfunction, or misallignment [sic] of the jaw, which is consistent with the headaches and pain upon chewing of which Epprecht complains (Wagshull). The jaw problem can be remedied by an office procedure, but has caused Epprecht pain for nearly 5 years – some 1,700 days.

Additionally, Epprecht suffers from a permanent sensory deficit in the left cheek that will forever produce sensations of numbness and, upon elongated bouts of chewing, pain (Wagshull). And lastly, Epprecht was diagnosed by Dr. Caddy as suffering from a moderate adjustment disorder with mixed emotional features. Considering all of these factors, and overlaying the permanency of Epprecht's facial injury on the life expectancy of this 33 year old plaintiff, the Court awards Epprecht Seventeen Thousand Dollars ($17,000.00) in compensatory damages.

250. Two other of the plaintiffs, Eddie Cobb and Edwin Johnson, both suffered injuries that appear to have been serious, but less substantial than Epprecht. Cobb was stabbed, requiring 18 stitches in his scalp and 12 on his right arm (Cobb, Pg. 768), has a permanent scar on his right arm (*Ibid*, Pg. 767), and complains of pounding headaches and dizziness that he previously had not experienced. Johnson was hit in the head with a stool and was hospitalized for two weeks after receiving five stitches in his scalp (*Ibid*, Pg. 883). Johnson additionally was diagnosed by Dr. Caddy as suffering from an adjustment disorder with mixed emotional features (Caddy, Pg. 1216). In addition to both their physical, and in the case of Johnson, psychological injuries, Cobb and Johnson were both confined for lengthy periods of time. Cobb was locked in administrative confinement from February 6 through March 15, 1985, notwithstanding the fact that he was the victim, not the aggressor in the fight that preceded his confinement (Peters). *See*, P.Ex. 15, Section C (Department of Correction Daily Records of Segregation for Eddie Cobb from Feb. 6, 1984 to March 15, 1984). Johnson stayed in protective confinement for his own

safety. Considering these factors, the Court awards Six Thousand, Five Hundred Dollars ($6,500.00) in compensatory damages to Cobb and Thirteen Thousand Dollars ($13,000.00) to Johnson.

251. Two Plaintiffs were not seriously physically injured. Michael Gordon, however, was injured psychologically, suffering an adjustment disorder with mixed emotional features (Caddy, Pg. 1164) growing out of a period of incarceration that included two incidents of robbery in which he was hit in the face or head (Gordon, Pgs. 907 and 910), one incident in which his buttocks were singed when a drunken inmate lit Gordon's polyester underwear on fire (*ibid*, Pg. 909), and one incident in which he was extorted by a guard (*Ibid*, Pg. 902). Mr. Gordon is no longer in prison and cannot avail himself of institutional mental health services. [Dr. Caddy testified that some of the inmates could need as much as 80 therapeutic visits (Caddy, Pg. 1271), the cost of which ranges up to as much as $125 an hour (*Ibid*, Pg. 1271)]. Gordon deserves to be compensated for his emotional distress and the experience he suffered; the Court awards Gordon Six Thousand Dollars ($6,000.00) in compensatory damages.

252. LaMarca suffered neither physical injury nor any especially severe psychological damage. He did, however, endure four months in protective confinement and an additional six months in a county jail for escape, an escape this Court interprets as being prompted by the conditions put at issue by this action, an action initiated *pro se* by LaMarca. Those 10 months total some 300 days which, if valued for the loss of privileges that Mr. LaMarca endured while in protective confinement (120

days) and for the loss of what would otherwise have been complete freedom (180 days), provide a basis for an award to LaMarca. The Court awards LaMarca Nine Thousand Dollars ($9,000.00) in compensatory damages.

253. In summary, the Court finds that each Plaintiff is entitled to the following award of compensatory damages for injuries suffered by each Plaintiff as the consequence and direct result of Defendant Turner's violation of each plaintiff's constitutional rights:

(i) Anthony LaMarca	$9,000
(ii) Martin Saunders	30,000
(iii) Edwin Johnson	13,000
(iv) David Aldred	30,000
(v) Steve H., Bronson, Jr.	30,000
(vi) Eddie Cobb	6,500
(vii) Ron Durrance	30,000
(viii) Wayne Epprecht	17,000
(ix) Michael Gordon	6,000
(x) Billy Joe Harper	30,000

b. THE INJUNCTIVE CASE

(1.) STANDARDS

254. This Court is aware that with respect to several of the allegedly unconstitutional practices of confinement at GCI, the Defendants have instituted changes or improvements. "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform when there is possibility of resumption." *United States v. Oregon State Medical Society*, 343 U.S. 326, 333, 72 S.Ct. 690, 695, 96 L.Ed. 978 (1952). As a general proposition, the "voluntary cessation of

allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot . . . The defendant is free to return to his old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953) (footnote omitted). Although Defendants' efforts to ameliorate or correct the alleged deficiencies at GCI are commendable, they do not deprive this Court of the power to order injunctive and/or declaratory relief, where otherwise proper, unless: "(1) it can be said with assurance that 'there is no reasonable expectation' that the alleged violation[s] will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979) (quoting *United States v. W.T. Grant Co., supra*, 345 U.S. at 633, 73 S.Ct. at 897). Defendants bear a "heavy" burden of showing that both of these conditions have been satisfied in order to render moot any allegedly deficient conditions or practices of confinement. *County of Los Angeles v. Davis, supra*, 440 U.S. at 631, 99 S.Ct. at 1383.

255. This Court is concerned that the Superintendent of GCI during the trial, Defendant Music, left that position December 13, 1985. Thus, there is no assurance that improvements made by Defendant Music during his tenure at GCI will be continued. Additionally, the Court is of the view that improvements made by Defendant Music did not completely eradicate the unconstitutional conditions of confinement.

(2.) INJUNCTIVE RELIEF

256. There have been beneficial changes at GCI since the retirement of Defendant Turner as superintendent – e.g., expeditious transferring of known "wolves," the barbed-wiring beneath the fence surrounding the confinement area, and the removal from dormitory bunks of such obstructions as towels and lockers. What happened to witness Larry Brown as recently as June, 1985 – and, equally to the point, what has not happened to any of his assailants, despite this Court's having found Brown to be forthcoming witness – makes patent the need for systemic changes.

257. The Court orders that two committees be established, one of penologists and the other of psychologists or psychiatrists, to advise the Court in the formulation of specific injunctive relief.

258. The charter of the committee of penologists shall be to review and develop relevant procedures at GCI. One goal of this committee shall be remedial: to ferret out other rape victims[67] who have not been identified through this litigation, so that they may be provided whatever therapeutic assistance is needed. A second, more far reaching goal will be prospective: to prevent a recurrence of the assaults, extortions, and homosexual

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[67] For the reasons discussed, *supra*, in the section on the underreporting of rapes, the Court is of the mind, although it is unnecessary here to so hold, that a number of additional homosexual rapes did occur at GCI.

rapes that unfortunately – but not inevitably – have characterized life on the compound at Glades Correctional Institution.

259. The charter of the committee of psychiatrists/psychologists shall also be two-pronged. The first mission shall be to prescribe a treatment plan for the plaintiffs and witnesses in this action who remain incarcerated. The second will be to develop an internal mechanism within the prison for providing the male rape victims of Glades Correctional Institution the same kind of support that female rape victims on the outside receive from rape crisis centers.

260. The parties shall nominate one member of each committee, submitting the nominees' names to the District Judge within 30 days of the date of this Order. The Court shall name the third member, who shall be chairman. The committee shall report to the Court within 60 days with an outline of the therapeutic services needed for the instant plaintiffs and witnesses, and with a preliminary plan for the remaining tasks.

c. A LOOSE END: IDENTIFICATION OF THE CLASS

261. On April 15, 1984, this Court (Paine, J.) ordered that a class be certified consisting of those persons who are or will be incarcerated at GCI, for purposes of injunctive relief. Defendants have moved this Court to decertify this class on the grounds that none of the named plaintiffs, are presently at GCI. Defendants' request is denied.

262. While Defendants are correct that none of the named plaintiffs are presently incarcerated at the GCI, that fact does justify the relief sought by Defendants.

263. It is well settled that where the claim on the merits is "capable of repetition yet evading review," the named plaintiff may continue to litigate the action despite the plaintiff's loss of personal stake in the outcome. *Gerstein v. Pugh*, 420 U.S. 103, 110, n. 11, 95 S.Ct. 854, 861, n. 11, 43 L.Ed.2d 54 (1975). Since seven of the named Plaintiffs continue to be incarcerated within the Florida State prison system, there exists a distinct possibility that they will again be incarcerated at GCI since inmates are subject to reassignment to various institution within the system.

264. The "capable of repetition, yet evading review" doctrine is clearly applicable "where the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may arise again with respect to that plaintiff." *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 398, 100 S.Ct. 1202, 1209, 63 L.Ed.2d 479 (1980) citing *Weinstein v. Bradford*, 423 U.S. 147, 148, 96 S.Ct. 347, 348, 46 L.Ed.2d 350 (1975); *Roe v. Wade*, 410 U.S. 113, 123-125, 93 S.Ct. 705, 711-13, 35 L.Ed.2d 147 (1973). The *Geraghty* Court reasoned that "[s]ince the litigant faces some likelihood of being involved in the same controversy in the future, vigorous advocacy can be expected to continue." *Id.*

265. However, notwithstanding this Court's conclusion that the Plaintiffs may continue to prosecute this class action, even though they are no longer incarcerated at GCI, the Court is still required to examine the ability of

the named representative "to fairly and adequately represent the interest of the class." Fed.Rule Civ.Proc. 23(a); *Sosna v. Iowa*, 419 U.S. 393, 400, 403, 95 S.Ct. 553, 557, 559, 42 L.Ed.2d 532 (1975); *United States Parole Commission v. Geraghty, supra*, 445 U.S. at 406-407, 100 S.Ct. at 1214.

266. In this action, the named Plaintiffs have and continue to adequately represent the interests of the class. It is unlikely that the named Plaintiffs would have interests in conflict with the class and the interest of the class have been competently represented throughout all these proceedings, the trial and during the post-trial activity. *Sosna v. Iowa, supra*, 419 U.S. at 403, 95 S.Ct. at 559.

267. Finally, prior to decertifying the class on the basis that the named Plaintiffs are no longer class members, this Court would be obliged to provide class members with notice of what has occurred and provide them with an opportunity to come forward as a named Plaintiff class representative. *See, U.S. Parole Commission v. Geraghty, supra*, 445 U.S. at 407, 100 S.Ct. at 1214. In view of the Court's finding that the named Plaintiffs are presently adequately representing the class, the Court need not provide any such notice to class members at this time.

III. CONCLUSION

268. In summary, for the reasons detailed in this decision, this Court concludes that GCI was run in a manner that violated Plaintiffs' constitutional rights to not be subjected to "cruel and unusual punishment" and that as a consequence of Defendant Turner's indifference to Plaintiffs' rights, each plaintiff suffered injuries for which he shall be compensated.

269. Additionally, in order to avoid any recurrence of the way GCI was operated by Defendant Turner, and to ensure that additional improvements will be implemented to address victims of the unconstitutional practices, the Court has ordered the injunctive relief described herein.

270. Finally, as the prevailing party in this action, Plaintiffs are entitled, pursuant to the Civil Rights Attorney Fees Awards Act of 1976, 42 U.S.C. § 1988, to an award of attorney fees and litigation expense reimbursement.

271. Plaintiffs shall file with the District Judge within twenty (20) days from issuance of this Order appropriate fee/expense submissions and accompanying memoranda as to this issue. Defendants shall respond within twenty (20) days from Plaintiffs' filing. The District Judge may then enter an appropriate Order granting Plaintiffs' attorney fees and litigation expenses consistent with the parties' submissions.

Pursuant to statute, the parties may file and serve, with the District Judge in West Palm Beach, and within ten (10) days of the entry of this Order, their written objections to any portion of these findings of Fact or Conclusions of Law.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5878

D. C. Docket No. 82-8196

ANTHONY LaMARCA, MARTIN SAUNDERS, and EDWIN JOHNSON, Individually and on behalf of all others similarly situated, and DAVID ALDRED, STEVE H. BRONSON, JR., EDDIE COBB, RON DURRANCE, WAYNE EPPRECHT, MICHAEL GORDON and BILLY JOE HARPER,

Plaintiffs-Appellees,

versus

R. V. TURNER and CHESTER LAMBDIN,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(October 18, 1988)

Before TJOFLAT and EDMONDSON, Circuit Judges, and GIBSON*, Senior Circuit Judge.

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*Honorable Floyd R. Gibson, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

PER CURIAM:

We dismiss this appeal without prejudice for want of a final judgment adjudicating all of the claims against all of the parties in this case. In the proceedings below, appellees sought both money damages and injunctive relief. The district court, in its order of June 4, 1987, decided appellees' claims for money damages, but it did not decide their claim for injunctive relief. In fact, the court stated that it would establish two committees "to advise the court in the formulation of injunctive relief," plainly indicating that it had not finally disposed of the case.

The case is returned to the district court so that it may complete its work.

DISMISSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.82-8196-CIV-PAINE

ANTHONY LaMARCA, MARTIN SAUNDERS, and EDWIN JOHNSON, individually and on behalf of all others similarly situated, and DAVID ALDRED, STEVE H. BRONSON, JR., EDDIE COBB, RON DURRANCE, WAYNE EPPRECHT, MICHAEL GORDON, and BILLY JOE HARPER, individually,

Plaintiffs,

vs.

R.V. TURNER, individually in his former capacity as Superintendent of Glades Correctional Institution, CHESTER LAMBDIN, in his official capacity as Superintendent of Glades Correctional Institution,

Defendants.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed April 29, 1990)

This matter comes before the court upon an evidentiary hearing held January, 8-12, 1990.

The hearing was held as a result of an October 18, 1988 order from the Eleventh Circuit Court of Appeals in which the appellate court dismissed without prejudice the appeal of the prior order entered by this court. The

appeal was dismissed "for want of a final judgment adjudicating all of the claims against all of the parties in this case." Finally, the appellate court directed this court to complete its work and enter final judgment regarding the requested injunctive relief.

Accordingly, having reviewed the proposed findings of fact and conclusions of law submitted by each party, the court enters the following order.

PROCEDURAL BACKGROUND

In light of the fact that the present case has been remanded by the Eleventh Circuit Court of Appeals and that this lawsuit spans almost eight years, the court has determined that a brief review of the procedural background of the case is in order.

On March 14, 1982, Anthony Lamarca filed a handwritten, *pro se* complaint in the United States District Court pursuant to 42 U.S.C. § 1983. The named defendant was R.V. Turner, the then-Superintendent of Glades Correctional Institution (GCI). The complaint contained, *inter alia*, allegations that Lamarca was being subjected to ongoing physical violence and harassment by other inmates because of his refusal to participate in homosexual activity. Additionally, the Plaintiff alleged that GCI officials failed to take any corrective action to alleviate that situation. Pursuant to the Southern District of Florida Local Magistrate Rule 1(f), this case was transferred Magistrate Peter L. Nimkoff.

On September 21, 1983, Lamarca, now represented by counsel and joined by three other former and/or current

prison inmates at GCI, Martin Saunders, Eswin [sic] Johnson, and Harry Rosenbaum, filed an amended class action complaint on behalf of themselves and other inmates at the institution. The First Amended Complaint purported to redress physical and sexual assaults and threats of physical and sexual assaults. In the first amended complaint, Plaintiffs sought monetary damages as well as declaratory and injunctive relief to enjoin the Defendants from various practices and inaction which perpetuated the violence, threats, and sexual abuse by prisoners at GCI.

On November 2, 1983, the Defendants filed their answer to Plaintiff's First Amended Complaint. The Defendants did not demand a jury trial at that time.

The injunctive relief aspect of the lawsuit was certified as a class action on April 13, 1984. The court defined the class as all persons who were, or would be, incarcerated at GCI.

On September 20, 1985, the court granted the Plaintiffs leave to file a Second Amended Complaint, the effect of which was to include damage claims of additional Plaintiffs. Additionally, regarding the injunctive relief, the Second Amended Complaint named Defendant Turner's successor at GCI, Randall Music, in his official capacity. Thereafter, the Defendants made a demand for jury trial.

Finally, on November 15, 1985, Plaintiffs moved for leave to file a third amended complaint, which would substitute certain plaintiffs. The Magistrate granted the Plaintiff's motion to file a Third Amended Complaint

and, in the same order, denied the Defendant's jury demand as well as a second request for a continuance.

Magistrate Nimkoff held an evidentiary hearing in December, 1985. During the pendency of the hearing, the Defendants raised the matter of recusal of the Magistrate. The motion for recusal was denied. On January 8, 1986, the Magistrate entered his Report and Recommendation. Despite the Defendants objections to the Magistrate's Report and Recommendation, this court affirmed same as to most of the issues. That order is reported at *Lamarca v. Turner,* 662 F. Supp. 647 (1987).

The Defendants filed a timely appeal which, as discussed above, was dismissed without prejudice.

On October 18, 1989, this court conducted a status conference in the present case. Thereafter, on October 23, 1989, the court issued an order setting forth a discovery schedule and scheduling an evidentiary hearing for January, 1990. In that order the court noted that "neither party strongly advocated the alternative of appointing committees to evaluate the prison conditions." Therefore, upon agreement of counsel for both sides, the court determined that the idea of implementing committees should be abandoned. In this regard, the court impliedly vacated that part of the June 4, 1987 order which contemplated the utilization of committees to recommend injunctive relief.[1]

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[1] Regarding the appointment of committees to address the injunctive relief, the court expresses some concern that such an appointment might result in an impermissible delegation of judicial responsibility. However, in the present case, since all of

PURPOSE AND SCOPE OF THIS ORDER

The purpose of this order is to determine what, if any, injunctive relief should be granted in this 42 U.S.C. § 1983 class action.

At the commencement of the evidentiary hearing, the court granted the Defendants' Motion to substitute Chester Lambdin in his official capacity as Superintendent of GCI. The court denied the Defendants' request to consider additional evidence relating to the "liability" evidence which was presented four years earlier during the December, 1985 proceedings.

Finally, the court denied Defendants' motion challenging its jurisdiction to provide psychological and psychiatric relief for abused inmates because of a the possible overlap of these issues raised in the ongoing 18-year-old statewide prison condition lawsuits styled *Costello and Celestineo v. Dugger,* Case No. 72-094-Civ-J-14; Case No. 72-109-Civ-J-14 (Jacksonville Division) (Black J.).

By denying the Defendants' Motions prior to the hearing, the court limited the scope of the January, 1990 evidentiary hearing in two distinct ways. First, the hearing was to address only the injunctive relief aspect of the *Lamarca* case. In so ruling, the court refused to disturb its prior ruling. Consequently, the June 4, 1987 order, published at *Lamarca v. Turner,* 662 F. Supp. 647 (1987), is

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the parties agreed that the appointment of committees would be cumbersome and unduly expensive, the court need not address the legality of such a delegation of judicial authority.

incorporated herein by reference and hereby made a part of this court's imminent final judgment in this case.

Second, the court limited the scope of this case so as not to impose upon the pending jurisdiction of the *Costello* and *Celestineo* cases. Accordingly, the court does not intend that these findings be interpreted to address issues of overcrowding, food service, nor health care, as those issues are being addressed in the pending Middle District class actions.

Finally, before the proceedings began, the Plaintiffs moved the court to consider the claim of Martin Saunders, former party plaintiff.[2] Mr. Saunders has allegedly suffered retaliation at the hands of correctional personnel because of his participation in this case. The Defendants objected to the court's entertaining any argument or hearing any evidence on Mr. Saunder's retaliation case. The court sustained the Defendants' objection. It is the opinion of this court that such allegations of retaliation are questions of fact which are outside the scope of this litigation.

FINDINGS OF FACT

1. The court finds that since January 1, 1986, the date to which this court's order of June 4, 1987 related, the conditions at GCI have changed so that much of the injunctive relief previously requested is no longer necessary.

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[2] Although Mr. Saunders is still a Plaintiff in the liability and damages aspect of the case, he is no longer an inmate at GCI. Therefore, he is not a member of the class action for the purposes of injunctive relief.

2. The court was impressed with the testimony of Chester Lambdin, the present Superintendent of GCI. He appears to be a dedicated public servant who is trying very hard to make GCI an efficient and effective correctional institution. However, despite his apparent dedication, there is ample room for improvement in the conditions at GCI.

3. The court viewed a videotape of the prison compound. The video depicted the physical conditions at GCI to be generally satisfactory.

4. However, despite the interim improvements, there are still problems at GCI which require this court's attention. Specifically, there are six areas that must be addressed:

a) Security staff patrol in the dormitory areas;

b) Control of movement of inmates from the North Compound to the Main Compound;

c) Conditions in protective confinement;

d) Control of contraband within the prison;

e) Homosexual Rape and the acceptance by staff of overt homosexual activity among inmates;

f) Lack of psychological counseling for inmates who have been sexually assaulted;

5. Security staff patrol in the dormitory areas:

a) Overall, GCI staff is better trained and less prone to turnover than in the pre-1985 period. In general, supervision of staff has been improved since 1985. During each shift, there is a wicket officer, a patrol officer, and a

sergeant to check on the officers in order to ensure that patrols are made.

b) In the February, 1987 audit by the American Correctional Association, GCI was found to be in compliance with regard to staff training standards.

c) However, the court notes that there still remain opaque glass panes in the shower which impede the view of the wicket officer. Additionally, the court is concerned that there are inherent problems with surveillance of inmates in the recreation room which is separated from the dormitory by a small hallway. The court finds that these areas of obstructed view cannot be properly controlled without a roving patrol.

d) In this regard, even Superintendent Lambdin acknowledges that, without a roving patrol, an officer located in the wicket may not be able to maintain adequate visual control over the dormitory.

e) Finally, the court finds that while patrol of the dorms is mandated by a written policy, there is some factual dispute as to whether *actual* practice conforms with written policy. The court finds that the guards do not patrol as frequently as is needed to protect all inmates in the dormitory – whether they be in the lavatory, the shower, the recreation room, or their own bunks.

f) This failure to routinely tour the area will surely result in a lack of protection for inmates in various areas of the dormitory. Failure to properly supervise guards and to enforce written policies constitutes deliberate indifference on the part of GCI officials.

6. Control of movement of inmates from the North Compound to the Main Compound:

a) Since 1985, a new compound has been built. There are no support services, such as food service provisions in the North Compound. Therefore, while Main Compound inmates are restricted in terms of access to the new North Compound, North Compound inmates are required to enter the Main Compound because that is where they eat and get other support services.

b) Generally, inmates with lower custody ratings and shorter periods of time until release are housed in the north compound, while those on the main compound have higher custody ratings and longer periods of time until release.

c) The flow of traffic between the North and Main Compounds subjects vulnerable North Compound inmate population to potential victimization by higher security risk inmates on the Main Compound. This mingling of North Compound inmates with Main Compound inmates increases the likelihood that the lower risk inmates will be subjected to unwanted pressure.

d) Additionally, the metal detector, which is intended to detect and prevent the flow of homemade weapons from one compound to another, is often broken. Superintendent Lambdin testified that, since it is located outside, the metal detector is subject to condensation.

e) The court finds that, based on the past experiences at GCI if not the ongoing problems,[3] the administration is aware that there is a strong likelihood, rather than a mere possibility that the safety of less violent inmates is threatened by the co-mingling with more violent inmates.

7. Conditions in protective confinement:

a) While white inmates comprise approximately 41 percent of the inmate population at GCI, the statistics show that at any given time there is a much higher number of white inmates in protective confinement that [sic] black inmates. For example, in October, 1989, there were 19 people housed in protective confinement ; 17 white, one black, one other. On November 20, 1989, there were 22 people housed in protective confinement, 21 white, one black. On December 12, 1989, there were 14 people housed in protective confinement; 11 white, 2 black, one other.

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[3] The court acknowledges the testimony of Dr. Jorge Medina and Gary Lane, psychiatrist and psychologist at GCI, respectively, that they are unaware of sexual pressure and the occurrence of rape at GCI. Dr. Medina has been at GCI for 15 years, well before this court's prior finding that, in fact, homosexual's rapes have occurred at GCI. Mr. Lane has been there for six years. The court does not find either Dr. Medina nor Mr. Lane to be a credible witness. In light of the prior findings of this court, the court must conclude that these witness were either not testifying truthfully or have been intentionally "looking the other way" when it comes to sexual pressure and homosexual rape at GCI.

b) There is a shortage of cell space in protective confinement. Although the addition of the North Compound permitted the GCI population to increase from 886 to 1217, there has been no additional protective confinement space created at GCI. Due to the lack of protective confinement space at GCI, there presently exists the practice of double-bunking protective confinement inmates.

c) The court finds that Mark White was an inmate in a double-bunked protective confinement cell when he was raped by his cell-mate.

d) The ACA standard regarding confinement space requires that there be single cells in confinement because such a configuration decreases the chances of assaultive behavior. Both of Defendants experts, Mr. Fred A. Frey and Dr. Lockwood, testified that single cells are preferable in protective confinement and that double-bunking is not appropriate.

e) An officer is routinely stationed in front of the confinement area at a control post from which visual observation of all protective confinement cells is impossible. Again, while the official policy requires officers to make timely patrols, there is a question of fact as to whether the actual practice mirrors the official policy. The court is not satisfied that the official policy regarding patrols is being carried out by the guards.

f) The court was pleased to learn that there is presently a plan underway which would more than double the capacity of confinement at GCI.[4] However, Superintendent Lambdin testified that even with the additional

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[4] Lambdin reported to the court that the expected date of completion of the additional confinement area is June, 1990.

confinement space, the current practice of double-bunking in protective confinement will continue.

g) In 1987, an ACA review committee found GCI to be in violation of the ACA standards on the subject of lighting and the provision of writing space in protective confinement.

h) Finally, the court finds that many inmates who request to be put in protective confinement due to fear for their safety in the general population simply stay in confinement too long. Of the ten inmates who complained of a sexual assault and who were placed in protective confinement at GCI, six inmates stayed in protective confinement for more than 40 days. In fact, one person remained there for six months and 19 days. However, the record shows that Superintendent Lambdin has, on other occasions, accomplished the transfer of confined inmates within a day or two.[5]

i) ACA standards regarding transfer of inmates from Protective Confinement to another institution require that an inmate should be transferred as early as

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[5] In this regard, the court is compelled to note that the Superintendent cannot be afforded the luxury of "averaging" the amounts of time each prisoner spent in protective confinement before transfer, in an attempt to slant the facts. If one inmate remains in confinement for six months, the fact that another remained only 2 days has no impact upon the possible violation of the first inmate's constitutional protection against cruel and unusual treatment in prison.

Additionally, the fact that transfer of an inmate has been effected in such a short time period supports the fact that expeditious transfer of inmates is feasible.

possible after it is determined that the inmate cannot return safely to the general inmate population.

8. Control of contraband within the prison:

a) The court finds that the flow of contraband, such as drugs, alcohol, and weapons, has decreased as compared to the pre-December, 1985 period. However, despite the reduction in availability, the court finds that there is a still a high availability of drugs such as homemade wine, marijuana, and crack cocaine on the Compound. Additionally, both the Plaintiff and the Defendant presented evidence that weapons are homemade weapons are present/

b) Dr. Swanson, the Plaintiffs' Corrections expert reported to the court that after his research he concluded that the supervisors at GCI appear to be somewhat complacent regarding certain drugs, especially marijuana. To support this finding, Dr. Swanson compared the disciplinary reports of an inmate who had sneaked into the cafeteria line with that of an inmate who was found to possess drugs for sale along with a list of names and dollar amounts which the inmate admitted were drug debts. The two inmates received similar disciplinary actions.

c) The court finds, in light of all of the testimony, that there is an attitude on the part of the staff that certain kinds of contraband, such as home-made wine and weapons, are unavoidable, and that lackadaisical attitude contributes to the availability of contraband on the Compound.

d) The court also finds that the disciplinary reports reviewed by Dr. Swanson indicated that only 3.8 percent of all disciplinary problems were weapon-related. Dr. Swanson's offered credible testimony that these statistics establish a very low level of weapons confiscations and, therefore, raise a question regarding the vigilance of the staff in trying to confiscate these weapons.

e) Superintendent Lambdin himself testified that there remains a problem of contraband entering the compound via non inmates throwing same over the fence.

f) Finally, there was testimony that the metal detectors, both between the North and Main Compound, and between the prison and the outside world, are often in disrepair.

9. Homosexual Rape and the acceptance by staff of overt homosexual activity among inmates:

a) Despite the improvement in the conditions at GCI since 1986, the court finds that homosexual rape is still occurring at the institution. Mark White, Arnold Dennis, and John Haveard each testified that they were raped while serving time at GCI.[6]

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[6] While the court acknowledges that the Defendants made certain inroads on cross-examination regarding the credibility of these witnesses and the verity of their accounts of rape, the court finds these witnesses to be credible. In view of the psychological impact and the stigma attached to male rape victims, it is difficult for the court to conclude that these prisoners would come into court and complain of rape had it not actual [sic] occurred.

b) Dr. Caddy, the Plaintiffs' psychological expert, testified that his interviews with inmates left him with the impression that the report of homosexual rape was not taken with the seriousness it warrants. He testified that the inmates at GCI indicated to him that the staff at GCI communicated an attitude that inmates who had been raped should have done something to solve their own problem and to be a real man.

c) Mark White's complaint about being raped was received with cynicism. Despite the fact that the medical report from Glades General Hospital indicated conditions consistent with a finding of sexual assault, the investigation of the rape was limited. Due to a lack of evidence, there was no internal reprimand nor state prosecution of the alleged rapist.

d) Arnold Dennis testified that he was raped in the bathroom of Dormitory B in the middle of the night. The next day, after further harassment and physical attack from his assailant, Dennis told an officer that he had been assaulted.[7] The officer told him to fight his rapist so that he would not bother him anymore. Dennis refused to do this. After identifying his rapist from photos, he was placed in protective custody. He was eventually transferred to another institution.

Despite his objections, Dennis was transferred in a van along with his rapist. During the transfer, he was attacked again.

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[7] Dennis admitted that he did not tell the officers about the rape because he found it too embarrassing and he didn't believe it would do any good.

e) John Haveard was raped in a closet by an inmate who had made sexual advances to him soon after Haveard arrived at GCI. Thereafter, he was transferred into protective confinement. Detective Haller, who investigated the rape of John Haveard, testified that no mugshots were ever shown to the victim and no search was conducted to find the rapist.

d) It is clear from the entire record in this case that the GCI officials are aware that there is presently a "strong likelihood, rather than a mere possibility," that a callous attitude regarding prison rape will surely result in the underreporting of same. Accordingly, the court finds that, failure to provide mandatory training for prison guards, those charged with the initial responsibility of handling a victim, constitutes deliberate indifference.

e) Although the inmates testified that there is staff toleration of overt sexual activity, there was not enough evidence presented for the court to conclude that this is the cause of inmate assaults.

f) In fact, during the year preceding this trial, there were 20 disciplinary reports and proceedings instituted against inmates at GCI who had been involved in 13 incidents of voluntary sexual activity. The Court notes that charges were brought in each case by different officers, indicating that more than just a handful of officers are reprimanding inmates for overt sexual conduct.[8]

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[8] This perceived "acceptance" might be rooted in the lack of adequate patrolling and supervision of the inmates by the officers, as discussed *supra*. If the officers don't see the activity, they will not report it and their failure to do so might be perceived as "acceptance."

10. Lack of psychological counseling for inmates who have been sexually assaulted:

a) None of the inmates who testified to having been raped at GCI was offered the opportunity to receive psychiatric counseling for rape victims.

b) There is presently no provision for mental health services, support services, or rape crisis management for GCI prisoners who have been raped.

c) The staff psychiatrist, Dr. Medina, has never, in the fifteen years he has been at GCI, been consulted regarding a single inmate who had been raped. The court finds that even had he been consulted, it is unlikely that he could have provided the needed rape counseling as he has had no special training for dealing with victims of rape.

d) Gary Lane, staff psychologist at GCI, has no experience in rape crisis treatment.

e) Dr. Caddy testified that when a person is raped in what appears to be a life-threatening circumstance, such a person is more vulnerable to the perceived threat and thus more likely to have a far greater degree of psychological maladjustment. For some men who have been raped, there is the sense that they have lost their manhood. They often suffer nightmares. The court finds that these symptoms are consistent with those reported by the raped inmates who testified.

d) Finally, the court finds Dr. Caddy to be most credible when he admits that, although these symptoms do not always require the intervention of a psychologist,

they do require the attention of a person who has expertise in the treatment of patients who have been sexually abused. No such person presently exists at GCI.

e) In light of the past and present circumstances at GCI, and the findings of psychological problems accompanied by homosexual assault in a prison setting, the court finds that the GCI officials have a duty to protect the health of rape victims within their compound. The failure to do so will surely result in the unnecessary and wanton infliction of pain.

CONCLUSIONS OF LAW

1. Title 42 U.S.C. § 1983 establishes the right of a person to pursue a civil action based upon the deprivation of federally protected rights. To recover, the plaintiffs must prove two elements: (1) the conduct complained of must have been committed by a person acting under the color of state law; and (2) the conduct must have deprived the plaintiff of rights, privileges, or immunities secured by the constitution or laws of the United States. *Paratt v. Taylor,* 451 U.S. 527, 535 (1981).

2. The language of the Eighth Amendment, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," manifests "an intention to limit the power of those entrusted with the criminal-law function of government." *Whitley v. Albers,* 475 U.S. 310, 318 (1986), *citing Ingraham v. Wright,* 430 U.S. 651, 664 (1977).

3. The Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and

decency . . . ," *Estelle v. Gamble,* at 102, *quoting Jackson v. Bishop,* 404 F.2d 571, 579 (8th Cir. 1968).

4. Accordingly, the Eighth Amendment prohibits punishments which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain," *Greg v. Georgia,* 428 U.S. 153, 173 (1976), or are grossly disproportionate to the severity of the crime. *Coker v. Georgia,* 433 U.S. 584, 592 (1977) (plurality opinion); *Rhodes v. Chapman,* at 346.

5. Harsh "conditions of confinement" may constitute cruel and unusual punishment unless such conditions "are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes v. Chapman,* 452 U.S. 337, 347 (1981).

6. "No static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from evolving standards of decency that mark the progress of a maturing society.' " *Rhodes v. Chapman,* at 346, *quoting, Trop v. Dulles,* 356 U.S. 86 (1958) (plurality opinion); *see also, Estelle v. Gamble,* 429 U.S. 97, 102 (1976). Conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional." *Rhodes v. Chapman,* at 347.

7. For a prisoner attempting to prove a violation of the Eighth Amendment, "[a]n express intent to inflict unnecessary pain is not required," *Whitley v. Albers,* at 318, *citing Estelle v. Gamble,* at 104. Rather, the "unnecessary and wanton" infliction of pain on prisoners constitutes cruel and unusual punishment prohibited by the Eighth

Amendment, even in the absence of intent to harm. *Id., citing Ingraham v. Wright,* at 670; *Gregg v. Georgia* at 173.

8. When officials become aware of a threat to an inmate's health and safety, the Eight Amendment's proscription against cruel and unusual punishment imposes a duty to provide reasonable protection. *Brown v. Hughes,* 894 F.2d 1533, 1537 (11th Cir. 1990), *citing Hopkins v. Britton,* 742 F.2d 1308, 1310 (11th Cir. 1984); *Gullate v. Potts,* 654 F.2d 1007, 1012 (5th Cir. Unit B 1981).

9. Merely negligent failure to protect an inmate from attack does not justify liability under § 1983. *Brown, supra, citing Davidson v. Cannon,* 474 U.S. 344, 347-48 (1986). However, where the known risk of injury is a "strong likelihood, rather than a mere possibility," an official's failure to act can constitute deliberate indifference. *Id., citing Edwards v. Gilbert,* 867 F.2d 1271, 1276 (11th Cir. 1989).

10. Upon a finding of constitutional violation, a federal court should enter injunctive relief that is "tailored to cure the 'condition that offends the constitution.' " Milliken v. Bradley, 433 U.S. 267, 282 (1977), *quoting, Milliken v. Bradley,* 418 U.S. 717, 738 (1974).

11. District judges possess substantial discretion in formulating injunctive remedies appropriate to the scope of the constitutional violations found. *Milliken,* 433 at 288; *Swann v. Charlotte-Mecklenburg Bd. of Education,* 402 U.S. 1, 15 (1971).

12. Regarding the possible mootness of the request for injunctive relief due to post-litigation improvements, the Supreme has stated:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave "the defendant . . . free to return to his old ways." A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)(citations omitted).

13. Additionally, the former Fifth Circuit has specifically applied this doctrine regarding the mootness of injunctive relief to the prison setting. In *Jones v. Diamond*, 638 F.2d 1364, 1375 (5th Cir. 1981) (en banc), *cert dismissed*, 453 U.S. 950 (1981), the appellate court refused to vacate an injunction in a prison conditions case even though former conditions had improved. The court said:

> [Changes made by defendants after a suit is filed do not remove the necessity of injunctive relief, for practices may be reinstated as swiftly as they were suspended. The burden is on the Defendants to prove that the wrongs of the past could not reasonably be expected to recur.

Jones, at 1374-75. That court concluded that the improvements in prison conditions after over five years of litigation, did not eliminate the need for an injunction.

INJUNCTIVE RELIEF

It must be noted that, for practical reasons, it is not within the jurisdiction nor power of this court to enjoin

homosexual rape, assaults, smuggling, or the use of contraband within the prison. The court may, however, enjoin certain procedures or require others, in an attempt to decrease the likelihood of the occurrence of these social ills within the confinement of the prison and to satisfy the requirements of the eighth amendment. Having determined that certain conditions exist within GCI which presently violate the eighth amendment prohibition against cruel and unusual punishment, the court must award injunctive relief in favor of the Plaintiffs.

Cognizant of both the financial constraints placed upon the Defendant and the awesome nature of his task, the Court must yet exercise its equitable authority, and remedy the practices and conditions that currently exist at GCI in violation of the eighth amendment.

Accordingly, the Defendant Chester Lambdin, Superintendent of GCI, is affirmatively enjoined to carry out the following required courses of action:

Regarding the Security staff patrol in the dormitory areas:

1. Any opaque glass panes in the shower area which impede visibility of the wicket officer must be replaced with clear glass. These panes are to be cleaned and maintained clear; when same again become opaque from grime, they must be promptly replaced.

2. An official policy regarding the frequency of the roving patrols must be promulgated and enforced. Guards should be warned that the failure to patrol will result in some sort of disciplinary action against them; repeated failure to comply with the roving patrol policy could result in the termination of the guard.

Regarding the control of movement of inmates from the North Compound to the Main Compound:

1. The metal detector located between the North and Main Compound must be kept operative and in good repair. Frequent inspections of same should be conducted to assure it is operating correctly.

Regarding Conditions in protective confinement:

1. There shall be no double-bunking in protective confinement.

2. There shall be no prolonged stays in protective confinement; any stay in excess of 30 days is a prolonged stay.

3. There shall be swift transfer of any inmate who is in protective confinement and for whom it has been determined that return to the general prison population would be unsafe.

4. The lighting in protective confinement must meet the ACA requirement.

5. The roving patrol by the officer guarding protective confinement must be enforced. Any violation should be sanctioned in the same manner as noted above, that is, disciplinary action and/or termination for repeated failure to patrol.

Regarding Control of contraband within the prison:

1. The Superintendant [sic] must promulgate and publish to all guards and inmates an official policy on the handling and severity of a violation involving all contraband, including drugs, alcohol, weapons.

2. Additionally, he must institute a consistently harsh, standard penalty for those prisoners found in possession of contraband.

3. The staff must perform regular "shake-downs" of the dormitories to detect the presence of contraband. Additionally, the guards must be warned that the repeated discovery of contraband in the area for which they are responsible will result in disciplinary action against them. Continuous discovery of same could result in termination.

4. The staff must conduct thorough searches for contraband of all those entering the compound, including the guards reporting for work each day.

5. The metal detector at the entrance to the compound must be operative at all times; regular inspections must be conducted to assure same.

Regarding Homosexual Rape and the acceptance by staff of overt homosexual activity among inmates:

1. The Superintendant [sic] must institute an official procedure for the prompt investigation of all alleged sexual assaults; he must see that same is enforced.

2. He must see that all alleged cases of sexual assault are referred to the state attorneys office for possible prosecution.

Regarding the lack of psychological counseling for inmates who have been sexually assaulted:

1. The Superintendant [sic] must provide training for all prison guards in the handling of rape complaints. This

should include education regarding the seriousness of a homosexual assault in prison.

2. The Superintendant [sic] must require the staff psychiatrist and the staff psychologist to acquire special training in the form of a course or seminar on rape crisis management.

3. He must promulgate an official referral procedure of all rape victims to the resident psychiatrist or psychologist for evaluation.

SUGGESTED REMEDIES

In addition to the above required injunctive relief, the court hereby strongly *suggests*, although does not require, that the Defendant Chester Lambdin adopt the following procedures:

1. Installation of a time clock at various check-in areas to monitor and enforce the roving patrol of all prison guards.

2. Construction of food service facilities and support facilities at the North Compound so that North Compound inmates need not co-mingle with the Main Compound inmates.

3. Expeditious completion of the additional confinement areas to cure the lack of available space therein.

4. Employment of trained dogs to detect the presence of marijuana and cocaine in the dormitories.

5. Investigation and consideration of the possibility of installing higher fences to prevent the passing of contraband over the fence.

6. Creation of an on-site rape crisis center, manned by an expert in the field of rape crisis management.

7. Improvement of work programs for inmates. The Superintendant should consider the implementation of an educational program in horticulture. A tree farm and/or nursery might be put into operation wherby [sic] the skills of landscape, maintenance, nursery work, and vegetable production might be taught.

In view all of the foregoing, it is

ORDERED and ADJUDGED that Plaintiff's Request for injunctive relief is GRANTED. The Clerk of the court is hereby instructed to enter final judgment in favor of the Plaintiffs and against the Defendants in accordance with the provisions of this order and the June 4, 1987 order of this court. Thereafter, the clerk is instructed to close this case as all remaining issues, save for the award of attorneys fees, have now been addressed and resolved. Additionally, it is

ORDERED and ADJUDGED that that part of the June 4, 1987 order which contemplates the use of committees to address the injunctive relief is hereby VACATED. However, in all other respects, that order, which addresses liability and damages, remains in full force and effect and is incorporated herein by reference. Finally, it is

ORDERED and ADJUDGED that ruling on the outstanding motion for attorneys fees and costs is hereby reserved until the previously pending motion is again

fully briefed and supplemented with supporting affidavits reflecting the *total amount of fees and costs* incurred. Accordingly, the Plaintiffs, the prevailing parties, are ordered to submit revised affidavits in support of fees within 20 days of the date of this order. Thereafter, the Defendant shall have ten days in which to respond to same.

DONE and ORDERED at West Palm Beach, Florida, this 28th of April, 1990.

/s/ James C. Paine
UNITED STATES DISTRICT JUDGE

cc:
David M. Lipman, Esq.
James A. Tucker, Esq.
William R. Amlong, Esq.
Michael Davis, Esq.
Walter Meginniss, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-8196-CIV-PAINE

ANTHONY LaMARCA, MARTIN SAUNDERS, and EDWIN JOHNSON, individually and on behalf of all others similarly situated, and DAVID ALDRED, STEVE H. BRONSON, JR., EDDIE COBB, RON DURRANCE, WAYNE EPPRECHT, MICHAEL GORDON, and BILLY JOE HARPER, individually,

Plaintiffs,

vs.

R.V. TURNER, individually in his former capacity as Superintendent of Glades Correctional Institution, CHESTER LAMBDIN, in his official capacity as Superintendent of Glades Correctional Institution,

Defendants.

_____/

FINAL JUDGMENT
(Filed April 30, 1990)

This action came on before the Honorable James C. Paine, United States District Judge, presiding. On this day the Court has entered its Findings of Fact and Conclusions of Law regarding injunctive relief in favor of the Plaintiffs and against the Defendant. Therefore, in accordance with this court's previous Order on Report and Recommendation of Magistrate reprinted in *Lamarca v. Turner*, 662 F.

Supp. 647, 650-667, and the Order of April 29, 1990, it is hereby

ORDERED and ADJUDGED that the Court's previous judgment entered on June 4, 1987, *Lamarca, supra,* 662 F. Supp. at 666-67 is readopted and in continuing effect except as modified or rejected by the court's Order of June 4, 1987, *Lamarca, supra,* 662 F. Supp. 650-666 and the April 29, 1990 order. Additionally, it is

ORDERED and ADJUDGED that judgment shall be entered effective on June 4, 1987 for Plaintiffs Lamarca, Saunders, Johnson, Aldred, Bronson, Cobb, Durrance, and Harper and against Defendant Turner in accordance with the following award of compensatory damages for Turner's violation of Plaintiff's constitutional rights:

(1)	ANTHONY LAMARCA	$9,000.00
(2)	MARTIN SAUNDERS	$30,000.00
(3)	EDWIN JOHNSON	$13,000.00
(4)	DAVID ALDRED	$30,000.00
(5)	STEVE H. BRONSON, JR.	$30,000.00
(6)	EDDIE COBB	$6,500.00
(7)	RON DURRANCE	$30,000.00
(8)	BILLY JOE HARPER	$30,000.00

Interest on the Judgment shall run from the date of the first Judgment of June 4, 1987 until paid, at the rate of 7.02 percent. Further, it is

ORDERED and ADJUDGED that regarding the claims of Plaintiffs Epprecht and Gordon, judgment is entered against for Defendants and against Plaintiffs, the

Plaintiffs to have nothing. Finally, regarding the claim for injunctive relief, it is

ORDERED and ADJUDGED that the Defendant Chester Lambdin, Superintendent of GCI, is affirmatively enjoined to carry out the following required courses of action:

Regarding the Security staff patrol in the dormitory areas:

1. Any opaque glass panes in the shower area which impede visibility of the wicket officer must be replaced with clear glass. These panes are to be cleaned and maintained clear; when same again become opaque from grime, they must be promptly replaced.

2. An official policy regarding the frequency of the roving patrols must be promulgated and enforced. Guards should be warned that the failure to patrol will result in some sort of disciplinary action against them; repeated failure to comply with the roving patrol policy could result in the termination of the guard.

Regarding the control of movement of inmates from the North Compound to the Main Compound:

1. The metal detector located between the North and Main Compound must be kept operative and in good repair. Frequent inspections of same should be conducted to assure it is operating correctly.

Regarding Conditions in protective confinement:

1. There shall be no double-bunking in protective confinement.

2. There shall be no prolonged stays in protective confinement; any stay in excess of 30 days is a prolonged stay.

3. There shall be swift transfer of any inmate who is in protective confinement and for whom it has been determined that return to the general prison population would be unsafe.

4. The lighting in protective confinement must meet the ACA requirement.

5. The roving patrol by the officer guarding protective confinement must be enforced. Any violation should be sanctioned in the same manner as noted above, that is, disciplinary action and/or termination for repeated failure to patrol.

Regarding Control of contraband within the prison:

1. The Superintendent must promulgate and publish to all guards and inmates an official policy on the handling and severity of a violation involving all contraband, including drugs, alcohol, weapons.

2. Additionally, he must institute a consistently harsh, standard penalty for those prisoners found in possession of contraband.

3. The staff must perform regular "shake-downs" of the dormitories to detect the presence of contraband. Additionally, the guards must be warned that the repeated discovery of contraband in the area for which they are responsible will result in disciplinary action against them. Continuous discovery of same could result in termination.

4. The staff must conduct thorough searches for contraband of all those entering the compound, including the guards reporting for work each day.

5. The metal detector at the entrance to the compound must be operative at all times; regular inspections must be conducted to assure same.

Regarding Homosexual Rape and the acceptance by staff of overt homosexual activity among inmates:

1. The Superintendent must institute an official procedure for the prompt investigation of all alleged sexual assaults; he must see that same is enforced.

2. He must see that all alleged cases of sexual assault are referred to the state attorneys office for possible prosecution.

Regarding the lack of psychological counseling for inmates who have been sexually assaulted:

1. The Superintendent must provide training for all prison guards in the handling of rape complaints. This should include education regarding the seriousness of a homosexual assault in prison.

2. The Superintendent must require the staff psychiatrist and the staff psychologist to acquire special training in the form of a course or seminar on rape crisis management.

3. He must promulgate an official referral procedure of all rape victims to the resident psychiatrist or psychologist for evaluation. Finally, it is

ORDERED and ADJUDGED that the Plaintiffs, as prevailing parties, are required to submit affidavits in

support of an award of fees and costs within 20 days of the date of the court's final order; the Defendant shall ha . e 10 days thereafter to respond to same. The court will then enter a post-judgment order regarding the award of attorneys fees and costs.

Dated at West Palm Beach, Florida on this 30th day of April, 1990.

ROBERT M. MARCH, CLERK

/s/ by: Svava Ringheim
Svava Ringheim,
Deputy Clerk

cc:
David M. Lipman, Esq.
James A. Tucker, Esq.
William R. Amlong, Esq.
Michael Davis, Esq.
Walter Meginnis, Esq.

Certified to be a true and
correct copy of the original.

Robert M. March, Clerk
U.S. District Court
Southern District of Florida

By /s/ Svava Ringheim
Deputy Clerk
Date 4/30/90

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-8196-CIV-PAINE

ANTHONY LA MARCA, MARTIN SAUNDERS, and EDWIN JOHNSON, individually and on behalf of all others similarly situated, and DAVID ALDRED, STEVE H. BRONSON, JR., EDDIE COBB, RON DURRANCE, WAYNE EPPRECHT, MICHEAL GORDON, and BILLY JOE HARPER, individually,

Plaintiffs,

vs.

R.V. TURNER, individually in his former official capacity as Superintendent of Glades Correctional Institution, CHESTER LAMBDIN, in his official capacity as Superintendent of Glades Correctional Institution, and the STATE OF FLORIDA,

Defendants.

_____/

ORDER

(Filed Sept. 21, 1987)

This cause came to be heard on Defendants' Motion for a New Trial and to Amend Findings (DE201), filed June 15, 1987; Defendants' Supplemental Motion (DE208), filed June 24, 1987; and Plaintiffs Response (DE215), filed June 7, 1987. Four points were raised: 1)failure to grant continuance; 2)appropriateness of injunctive relief;

3)exclusion of depositions; and 4)recusal of the magistrate. Each will be addressed in sequence.

First, Defendants' request for a continuance was addressed in this Court's order dated June 4, 1987. (see page 9) The prior decision on this issue will not be distrubed. [sic]

Second, the equitable relief provided by this court does not ignore Defendants' position. Breadth and flexibility are inherent in equitable redress of past wrongs. *Dowdell v. City of Apopka,* 698 F.2d 1181, 1186 (11th Cir. 1983). Defendants shall be afforded their day in court after the submission of the committees' reports.

Upon reconsideration, this Court vacates the portion of its previous order making the State of Florida responsible for the cost of the committees (see June 4, 1987 Order, page 45). The proper party to bear this cost is the current Superintendent, Chester Lambdin, in his official capacity as Superintendent of Glades Correctional Institution.

Third, on balance, the additional testimony is of little assistance given the entire record in evidence and the strength of the plaintiffs' case. The objection to the exclusion of the deposition testimony of witnesses is overruled.

Fourth, Defendants are unable to support a claim for recusal of Magistrate Nimkoff. The standard is whether he is "capable of judging a particular controversy fairly on the basis of its own circumstances." *Horton Joint School District No. 1 v. Hortonville Education Association,* 426 U.S. 493(1976). *See Southern Pacific Communications v. AT&T,* 740 F.2d 980, 990 (D.C. 1984). This Court is not persuaded

that Magistrate Nimkoff demonstrated bias in handling this case.

Therefore it is

ORDERED and ADJUDGED

1. Defendants' Motion for a New Trial/Amend Findings is DENIED.

2. The portion of this Court's June 4, 1987 Order directing the State of Florida to bear the cost of the committees is VACATED.

3. The cost of establishing and maintaining the committees shall be borne by the current Superintendent, Chester Lambdin, in his official capacity as Superintendent of Glades Correctional Institution.

DONE and ORDERED in chambers in West Palm Beach, Florida, this 19th day of September, 1987.

/s/ James C. Paine
JAMES C. PAINE
UNITED STATES DISTRICT JUDGE

cc: David M. Lipman
William Amlong
Walter M. Meginniss
Michael B. Davis

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5909

ANTHONY LA MARCA, MARTIN SAUNDERS and EDWIN JOHNSON, individually and on behalf of all others similarly situated, and DAVID ALDRED, STEVE H. BRONSON, JR., EDDIE COBB, RON DURRANCE, WAYNE EPPRECHT, MICHAEL GORDON, and BILLY JOE HARPER, individually,

Plaintiffs-Appellees,

versus

R.V. TURNER, individually in his former official capacity as Superintendent of Glades Correctional Institution, CHESTER LAMBDIN, in his official capacity as Superintendent of Glades Correctional Institution,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING
(Filed Oct. 4, 1993)

BEFORE: TJOFLAT, Chief Judge, DUBINA, Circuit Judge and WILLIAMS*, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by appellant is denied.

ENTERED FOR THE COURT:

/s/ Gerald Tjoflat
United States Circuit Judge

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* Honorable Jerre S. Williams, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

** Judge Williams did not participate in this decision due to his death on August 29, 1993. This decision is rendered by quorum. 28 U.S.C. 46(d)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5909

ANTHONY LA MARCA, MARTIN SAUNDERS and EDWIN JOHNSON, individually and on behalf of all others similarly situated, and DAVID ALDRED, STEVE H. BRONSON, JR., EDDIE COBB, RON DURRANCE, WAYNE EPPRECHT, MICHEAL GORDON, and BILLY JOE HARPER, individually,

Plaintiffs-Appellees,

versus

R.V. TURNER, individually in his former official capacity as Superintendent of Glades Correctional Institution, CHESTER LAMBDIN, in his official capacity as Superintendent of Glades Correctional Institution,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Filed Oct. 4, 1993)

Before: TJOFLAT, Chief Judge, DUBINA, Circuit Judge and WILLIAMS*, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Tjoflat
UNITED STATES CIRCUIT JUDGE

---

* Honorable Jerre S. Williams, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

** Judge Williams did not participate in this decision due to his death on August 29, 1993. This decision is rendered by quorum. 28 U.S.C. 46(d).

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 90-5909

DC DKT. NO. 82-08196-CIV-JCP

ANTHONY LA MARCA, MARTIN SAUNDERS, and EDWIN JOHNSON, individually and on behalf of all others similarly situated, and DAVID ALDRED, STEVE H. BRONSON, JR., EDDIE COBB, RON DURRANCE, WAYNE EPPRECHT, MICHAEL GORDON and BILLY JOE HARPER, individually,

Appellees,

v.

R. V. TURNER, individually in his former official capacity as Superintendent of Glades Correctional Institution, CHESTER LAMBDIN, in his official capacity as Superintendent of Glades Correctional Institution,

Appellants.

_____/

APPELLANTS' PETITION FOR REHEARING

COME NOW the Appellants, R. V. TURNER and CHESTER LAMBDIN, and, pursuant to F.R.A.P. 40, hereby request that this Court rehear this matter upon the following points upon which it may have misapprehended the law or the facts:

I.

Continuance

In discussion of the issue of the Magistrate's failure to grant a continuance, this Court's opinion states:

> Believing that Harper's claim raised no new issues, and thus created no need for additional discovery, the district court refused to grant a continuance. The court's belief was unfounded; Harper's claim raised several new issues requiring discovery. *See supra* note 34. After the trial began, the magistrate judge apparently had second thoughts about the defendants' need for a continuance; he permitted them to take discovery depositions both during and after the trial with the understanding that these depositions could be made a part of the trial record at a later date. The defendants accepted this arrangement, evidently believing that it would eliminate any prejudice the denial of the continuance otherwise might have occasioned. Given this acceptance by the defendants, we find that the defendants effectively waived their objection to the December 2 trial date.
>
> (p. 49-50).

The Court's perception that the Defendants accepted an arrangement, offered by the Magistrate, to take continued discovery during trial as a means of ameliorating the prejudice visited upon them by being forced to trial without having the opportunity to take pretrial discovery on the new Plaintiffs' claims is based on a misunderstanding of the record.[1] As this Court correctly notes, the

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[1] This misunderstanding may have been fostered by an ambiguous statement in the Defendants' brief:

Defendants, at a pre-trial conference on November 25, 1985, advised the Magistrate of their need to take discovery of potential witnesses whose identities were only recently uncovered (R: 10-31-38). This, together with the fact the Plaintiffs' primary expert, Richard Swanson, was not prepared to give testimony as to his opinions until a few days before the trial, formed the primary basis for the request for continuance (R: 10-43-46).

During the course of the trial, an entirely different matter arose. On December 11, 1985, counsel for the Defendants advised the Magistrate of a dilemma then confronting them. The defense had been contacted during the course of the trial by a number of inmates who had read about the court proceedings in the daily press and who were willing to testify that the conditions at GCI, as

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> "Although the District Judge subsequently suggested that investigation could be undertaken and discovery conducted during the course of trial, when the Defendants attempted this, the Magistrate excluded the testimony and his ruling was confirmed by the District Judge."
>
> (Appellants' Brief, p. 32)

Reference to the District Judge's suggestion about the taking of further discovery was to the after-the-fact statement in that judge's opinion rejecting the objection to the Magistrate's recommendation based on the failure to allow a continuance (*LaMarca v. Turner*, 662 F.Supp. 647, 653-654 (S.D. Fla.1987). As explained in detail, *infra*, the excluded depositions were not "discovery" in the strict sense, but trial testimony by witnesses reluctant to appear in open court. The sense attempted to be conveyed in the argument in the brief was that the suggestion that needed discovery could have been conducted was a hollow one in face of the fact that the Magistrate rejected such deposition testimony as was offered.

alleged by the Plaintiffs, did not exist. Since the Court, however, had certified as a plaintiff class all present GCI inmates, defense counsel were concerned as to whether they were free to speak with these inmates who had contacted them (R: 12-52-53).

Once the Magistrate resolved that issue by confirming that counsel could speak directly with those inmates who were willing, defense counsel raised a further issue: several of these inmates who had recently made contact and wished to testify would not do so if the press were present during their testimony. Counsel suggested two options to the Court: (1) that the Court proceed to take their testimony in a closed session, or (2) that the testimony be taken out-of-court by deposition and presented to the Magistrate in written form. The Magistrate opted for the latter since it avoided First Amendment complications and since it would avoid a potential time problem (R: 12-55-57).[2]

Subsequently, these witnesses gave their testimony.[3] It was this testimony which the Magistrate later excluded and which was referenced in the Appellants' Brief. At no time did the Defendants have the opportunity during

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[2] The trial had been scheduled for only two weeks and, by the eleventh of December, it was already clear that it could not be completed before mid-day Friday of the second week. By taking this testimony out of the formal session schedule, it would not create the potential problem of a trial-date overrun and consequent scheduling conflict.

[3] The witnesses gave their testimony in the courtroom without the presence of the Magistrate or the press.

trial to take needed discovery depositions of fact witnesses.[4] At no time in the course of trial did the Defendants accept an arrangement which in any way waived the objection they had earlier voiced to the denial of a continuance.[5]

II.

Jury Trial on Common Issues

In its discussion of the Defendants' argument for the granting of a jury trial upon any issues in the claims of

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[4] The Defendants did depose the Plaintiffs' expert psychologist, Dr. Caddy, during trial and prior to his trial testimony. Dr. Caddy, who was represented as only testifying on damage issues, did not conduct his initial interviews with the Plaintiffs until the weekend before trial, thus necessitating the late deposition (prior to the beginning of trial, he had no opinions to offer) (R:10-43). This arrangement, however, was by agreement of counsel and not on an offer from the Magistrate as an ameliorative measure to relieve the burden imposed by his denial of a further continuance.

[5] On the first day of trial, December 2, 1985, there was discussion of an arrangement agreed between the parties as to the taking of depositions of fact and expert witnesses that was implicitly sanctioned by the Magistrate (R: 11-20-23). This arrangement, however, pertained only to depositions by the *Plaintiffs* of defense witnesses. (Although an omitted comma on page 21 of the Transcript volume may, at one point, suggest that it was Defendants who would be deposing the witnesses, a careful reading of the complete dialogue makes it quite clear that the discussion concerns the ability of the Plaintiffs to depose defense witnesses in lieu of receiving answers to interrogatories served by the Plaintiffs seeking a precis of those witnesses' testimony.)

the original Plaintiffs common to the issues in the claims of the new Plaintiffs, the Court's opinion states:

> Turner argues that his right to jury trial as to the new plaintiffs' claims trumps his waiver as to common issues raised by the original plaintiffs' claims, *see In re Kaiser Steel Corp.*, 911 F.2d 380, 388 (10th Cir. 1990) (holding, in case with multiple parties, that waiver of common issue does not occur until ten days following the last pleading by any party), and therefore that he is entitled to a jury as to all claims. Turner concedes, however, that he knowingly waived his right to a jury as to the original plaintiffs' claims. Without a constitutional underpinning upon which to rest, Turner must demonstrate that the district court erred in its application of Rule 38 and that he was harmed by this error. *Cf. id.* (holding amendments to pleadings do not revive the right to jury trial as to issues already framed). Because he has not done so, Turner's initial waiver as to the original plaintiffs' claims ramains effective.
>
> (p. 47).

In arriving at the conclusion that the Defendants did not suggest a constitutional underpinning for their argument as to the right to a jury trial on such issues, the Court may have misapprehended the nature of the Defendants' argument.

Referencing the opinion in *Cedars Sinai Medical Center v. Revlon, Inc.*, 111 F.R.D. 24, 31-33 (D. Del. 1986), the Defendants noted:

> . . . where the right to trial by jury had been preserved in one of two separate claims, but not the other, the consolidation of the claims could

> seriously jeopardize the right to jury trial in the one claim in which that right was preserved as a result of issue preclusion or collateral estoppel.
>
> (Appellants' Brief, p. 29).

In the *Cedars Sinai* case, the court considered whether it should allow a consolidated trial of two cases. In one case, a timely demand for jury trial had been made, but, in the other, it had not. The Court noted that there might be common issues in the two cases and, if they were tried separately, the constitutional right to a jury trial in the one case would be placed in jeopardy unless a jury decided the common issues in both cases.

The jeopardy to the constitutional right alluded to by the court in *Cedars Sinai*[6] is presented by the doctrine of issue preclusion (direct or collateral estoppel). As referenced in footnote 13 of the Appellants' Brief, the rule established by the supreme court in the case of *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), and reiterated in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), to the effect that where a cause presents multiple claims, some of which are properly determined by the court and others of which are properly determined by a jury, then any common issues must be determined by the jury as factfinder to preserve the Seventh Amendment right to jury trial upon the claims properly determinable by jury.

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[6] see also *Bouchet v. National Urban League, Inc.*, 730 F.2d 799 (D.C. Cir. 1984) and *Dybezak v. Tuskegee Institute*, 737 F.2d 1524 (11th Cir. 1984).

As various courts have recognized, the protection of the right to jury trial in these circumstances may be achieved by one of two alternative procedures: (1) the trial judge may defer ruling upon the claims that are otherwise determinable by the court without jury until the jury has determined the issues in the claims to which the Seventh Amendment right inheres; the trial judge may then rule on the non-jury claims, deferring to the jury's determination of any common issues, *Beacon Theatres, Inc.*, supra, or (2) the trial judge may permit the jury to determine all claims with any common issues. *Cedars Sinai*, supra.

So long as the possibility exists that there are issues common to one or more of the claims of the original Plaintiffs and to one or more of the claims of the new Plaintiffs and, so long as the Defendant has preserved his right to a jury trial in respect to the latter, then the effect of collateral estoppel may place that right in jeopardy unless the common issues are determined by the jury or, alternatively, by the court in accordance with the jury's factual findings.

III.

Injunctive Relief

This Court has overlooked certain points of law and misapprehended facts below in its opinion of July 7, 1993 regarding injunctive relief. The District Court granted injunctive relief regarding protection of inmates, conditions in protective confinement and counseling of rape victims (R: 6-300-3-5). In upholding portions of the injunctive relief, this Court found that Lambdin did not

challenge the determination that GCI failed to provide inmates with reasonable protection from violence. *LaMarca v. Turner,* Case No. 90-5909, p. 34 (11th Cir. July 7, 1993). Lambdin clearly did challenge this determination at the stage 2 trial and on appeal (Appellants' Initial Brief, p. 15).[7] Further, the scope of the relief was limited to ensuring that past wrongs would not recur. *LaMarca,* Case No. 90-5909, at 36. However, since this Court has determined that the findings of fact are not binding on future proceedings in this action, *Id.* at p. 7, n. 8, there has been no determination of any past wrongs. The District Court granted injunctive relief "in accordance with its previous order on Report and Recommendation of Magistrate reprinted in *LaMarca v. Turner,* 661 F.Supp. 647, 650-677 . . . ". Thus, it relied on the 1987 findings of constitutional violations as a basis for finding that there were "still" problems which required the Court's attention (Findings of Fact, p. 7). Since there is no longer a finding that unconstitutional conditions existed in 1987, the basis for the 1990 fundings no longer exists. Although it may have been appropriate for the District Court to consider the Plaintiff's request for injunctive relief, this court has no basis on which to support injunction.[8]

This Court relies on *Milliken v. Bradley,* 433 U.S. 267, 282, 97 S.Ct. 2749, 2758 (1977), to support the District Court's grant of injunctive relief regarding protection of

---

[7] This Court does not find that Lambdin failed to challenge the District Court's finding of unconstitutionality of conditions in protective confinement and counseling of rape victims.

[8] Much of the relief ordered was in existence long before 1990 (Appellants' Initial Brief, p. 51-55).

inmates. *LaMarca,* Case No. 90-5909, at 36. The apparent purpose of the injunction is to prevent "the risk that GCI would *once again* disregard the safety of its inmates". *Id.* (emphasis added). This analysis assumes that GCI disregarded the safety of its inmates in the past. There is no finding of fact to support this conclusion. By contrast, in *Jones v. Diamond,* 636 F.2d 1364 (5th Cir. 1981), cited in *LaMarca,* at 33, there was a finding of unconstitutional conditions. The Fifth Circuit affirmed the injunctive relief despite changes made by the defendants to ensure that the "wrongs of the past" would not recur. *Jones* at 1375. There is no present finding of unconstitutional conditions or wrongs which have occurred in this action.

The Supreme Court has consistently required a finding of a violation of the constitution to uphold a grant of injunctive relief. *Milliken,* supra ("federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation"). As this Court has determined, a proper finding of fact that a constitutional violation has occurred has not been made. Thus, the grant of injunctive relief must be overturned in its entirety.

This Court has remanded this action because the District Court failed to make certain essential findings of fact and erred in its legal analysis. *LaMarca,* Case No. 90-5909, at 14. Essentially, the District Court did not consider the subjective component required to establish an Eighth Amendment violation as required in *Wilson v. Seiter,* ___ U.S. ___, 111 S.Ct. 2321 (1991). Unless this requisite component is established, an Eighth Amendment violation cannot be shown to exist. This component is required in official capacity actions for injunctive relief

as well as in individual capacity actions for damages. see *Wilson*, at 2325. Since no constitutional violation has been established, injunctive relief against Lambdin is not appropriate.[9]

Moreover, the specifics of injunctive relief ordered by the Court is an unauthorized intrusion on the day-to-day operations of GCI. The Supreme Court recognized that what is good, desirable, or expedient is not to be confused with what is constitutionally commanded. *Houchins v. KQED, Inc.*, 438 U.S. 1, 13, 98 S.Ct. 2588, 2596, 57 L.Ed.2d 553 (1978). The principle is well-settled, as recognized in this Court's opinion, that prison administrators must be granted wide-ranging latitude in the operations of their institutions. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 126, 97 S.Ct. 2532, 2538, 53 L.Ed.2d 629 (1977). The District Court ordered use and maintenance of metal detectors and the use of regular shakedowns. Whether to use detectors or shakedown – and not merely the matter of their use – is a matter of implementation of a policy (the detection of contraband) and to specifically require either is an improper intrusion into the prison administration's needed flexibility of means.

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[9] As *Wilson* makes clear, existence of the subjective element is a prerequisite to a finding of punishment. Without establishing a state of mind on the part of someone sufficient to show or imply intent, there cannot be a finding of *punishment* and the conditions at a prison, no matter how bad they may be, do not constitute cruel and unusual *punishment* without this subjective element. Without establishing the existence of cruel and unusual punishment, the District Court can have no warrant for issuing injunctive relief, however harsh the conditions see *Wilson* at 2325-2326.

The psychological/psychiatric aspect of the injunction must also be reversed. The District court found that GCI unnecessarily and "wantonly" inflicted pain by failing to provide post-rape counselling. However, wantonness cannot be established without the subjective component set forth in *Wilson*, supra. In order to establish a wanton infliction of pain, there must be an "inflicting officer" who *intentionally* inflicts cruel and unusual punishment. *Id.* The constraints facing the official rather than the effects of the conduct on the prisoner are the factors to consider in determining wantoness. *Wilson*, at 2326. There is no evidence that Lambdin or any other official possessed a culpable state of mind. On the contrary, the Court found Lambdin to be a "dedicated public servant who is trying very hard to make GCI an efficient and effective correctional institution" (R: 6-299-7). This observation fails to support deliberate indifference. Therefore, the grant of injunctive relief must be reversed.

IV.

Name of Party

The proper name of the Defendant is Robert Turner. "Randall" is the first name of the party predecessor to Lambdin, Randall Music. (Opinion, p. 2).

Conclusion

For the reasons set forth herein, the Appellants respectfully request that this Court rehear this cause upon the foregoing points and modify its decision accordingly.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to DAVID M. LIPMAN, ESQ., 5901 S.W. 74th Street, Suite 304, Miami, FL 33143-5186; WILLIAM R. AMLONG, ESQ., 101 N.E. Third Avenue, Second Floor, Fort Lauderdale, FL 33301; and DOUGLAS L. WILSON, ESQ., Florida Rural Legal Services, Inc., 110 South Second Street, Post Office Box 1109, Immokalee, FL 33934, by U.S. Mail, this 13th day of August, 1993.

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UNITED STATES CONSTITUTION AMENDMENTS

ARTICLE VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to the subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this action, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

No. 93-1085

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In The

Supreme Court of the United States

October Term, 1993

R. V. TURNER, Individually in his former capacity as Superintendent of Glades Correctional Institution, CHESTER LAMBDIN, in his official capacity as Superintendent of Glades Correctional Institution,

Petitioners,

v.

ANTHONY LaMARCA, MARTIN SAUNDERS and EDWIN JOHNSON, individually and on behalf of all others similarly situated, and DAVID ALDRED, STEVE H. BRONSON, JR., EDDIE COBB, RON DURRANCE, and BILLY JOE HARPER, individually,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a trial court may grant injunctive relief in a suit claiming that prison conditions violate the Eighth Amendment proscription against cruel and unusual punishment, having found that the prison administrators were guilty of deliberate indifference.

2. Whether a trial court may grant injunctive relief in respect to prison conditions which do not exceed the limitations of *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

3. Whether, in a case involving multiple plaintiffs, as to some of whom the defendants are entitled to a jury trial and as to the rest of whom the defendants are not so entitled, the Seventh Amendment requires a jury trial of the claims of the plaintiffs which involve the same facts, both as to "jury" and "non-jury" plaintiffs.

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STATEMENT OF THE CASE

Respondents accept the Statement of the Case of petitioners, except that, as ɔ the last sentence (Pet. for Cert. 10), respondents disagree that the injunctive provisions ordered by the Court of Appeals intruded into the sphere of administrative minutiae.

Further, respondents adopt the facts presented in the District Court's opinion, *LaMarca v. Turner*, 662 F.Supp. 647, 655-662 (S.D. Fla. 1987), the Magistrate's Report and Recommendation, *LaMarca v. Turner*, 662 F.Supp. 647, 671-705 (S.D. Fla. 1987), and the District Court's Findings of Fact and Conclusions of Law (6-299). Specifically, respondents note the following findings, as modified by the District Court:

No. 38 (667 F.Supp. at 673): Former Superintendent Turner admitted in writing in 1981 that the security staff was "simply being tolerated by the inmate population."

No. 39: Turner had written the Secretary of DOC in 1979, "I am apprehensive about our ability to control this population under the circumstances."

No. 40: The Palm Beach County Grand Jury issued a presentment on January 30, 1980, which, inter alia, noted a breakdown of proper prison management resulting in thefts by inmates, lax security precautions, and a free flow of contraband, including drugs, alcohol, gambling, theft, confiscation, and payoffs among the inmates and personnel of GCI.

No. 42 (*Id.* at 674): Later in 1980, the Department of Corrections Office of Inspector General corroborated similar security issues involving supervision and vacancies.

No. 45: Some three years later, the DOC Inspector General still noted "a need for a great deal of improvement" as to laxity and even disregard of established procedures.

No. 64, *Id.* at 678: There was no procedure for reporting rapes.

No. 68: After inmate LaMarca testified in the LaMarca case about other abuse or violations of inmates, counsel for the superintendent gave assurances that this testimony would be investigated, but they were not (No. 69), and the superintendent was unaware of them, thereby (No. 70) underscoring that GCI was not under the control of the then-superintendent.

No. 71. The superintendent was on notice that rapes were occurring, and the failure to promulgate and adhere to the most rudimentary procedures constituted deliberate indifference toward inmate security.

No. 75, *Id.* at 679: Conditions in protective confinement were punitive, in that they lacked proper ventilation.

No. 77: "Wolfing" and catcalls of aggressive black inmates in the compound exerted severe sexual pressure.

No. 105(iv), *Id.* at 685: Among the things the former superintendent could have done to prevent rape of inmates was not only a standard investigative procedure, but one which included polygraph tests, psychiatric evaluations, and in-depth interviews.

No. 111, *Id.* at 686: Underreporting of rape, by as much as 50% in the non-institutional context, is generally accepted, and (No. 112) is even greater in prison, because

of the humiliating and degrading consequences, and also because reporting may dramatically increase the risk of being raped again.

No. 119, *Id.* at 687: The consistent racial pattern in rapes at GCI was black inmates assaulting whites, which (No. 120) might be due to socioracial considerations involving revenge against whites generally, or instead to a criminal, male, youthful black subculture of violence. Whatever the motive, a prisoner, especially a white and/or slightly built one, might be raped even on his first day at GCI.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' HOLDING AS TO INJUNCTIVE RELIEF AND DECISIONS OF THIS COURT OR OTHER COURTS OF APPEALS

Petitioners argue, in general terms, that the Court of Appeals did not apply the subjective test of *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), and therefore its opinion is in conflict with that case. But the opinion of the Court of Appeals shows clearly that it accepts, follows and applies the principles of *Wilson*. In the absence of a clear showing of such a conflict, certiorari should not be granted.

A.

THE COURT OF APPEALS DID NOT ERR IN APPLYING *WILSON V. SEITER* TO THE INJUNCTIVE RELIEF IT ORDERED REGARDING THE ELEMENT OF WANTONNESS

Petitioners urge that, since the Court of Appeals found that the District Court had "failed to establish that the defendant had exhibited wantonness in accord with the standard prescribed in *Wilson v. Seiter* . . . ", there was an insufficient basis for ordering injunctive relief. This is a misleading characterization of the opinion of the Court of Appeals. In fact, the court held that all three of the required elements of *Wilson* were present (A.16, 23, 26), and remanded, on the issue of subjective knowledge, simply to determine whether that knowledge coincided in time with the occurrence of each violation complained of (A.29).

Such a requirement might be justifiable to support an award of damages resulting from those specific past injuries, but the inquiry for injunctive relief, being prospective, is different. Indeed, the parties are different: as to damages, the defendant in this case is R.V. Turner, the superintendent at the time of the injuries, sued in his individual capacity; as to injunctive relief, the defendant is Chester Lambdin, the current superintendent, sued in his official capacity. The Court of Appeals took care to point out this distinction (A.33-34), noting that as to official-capacity defendants, the defendant is really the institution (A.34, citing *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), and *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)).

Prospectively, a court's concern is whether sufficient measures have been taken to prevent harm from unconstitutional conditions in the institution recurring to *anyone* in the plaintiff class at *any* time. As the Court of Appeals pointed out, for injunctive purposes, the focus is not the deliberate indifference of the present incumbent superintendent, but the "historical indifference" of the institution (A.33), which requires the remedy of injunction unless it appears that "the wrongs of the past could not reasonably be expected to recur." *Jones v. Diamond*, 636 F.2d 1364, 1375 (5th Cir. 1981), cited by petitioners, citing *United States v. Concentrated Phosphate Export Association*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344, 348 (1968). As the Court of Appeals noted (A.33), petitioners have not challenged the determination that the prison failed to provide inmates with safety. Petitioners, not the respondents, have the burden of showing that the wrongs will not recur, which they have not done. *Jones, supra.*

Petitioners failed to discuss the difference in identity of the parties, or the different focus of the Court of Appeals, and they failed to demonstrate that the injunction was unnecessary. There is no demonstrated conflict with this Court's decisions and certiorari should not be granted.

B.

THERE IS NO CONFLICT WITH *BELL V. WOLFISH* AND NO DEMONSTRABLE CONFLICT AMONG THE CIRCUITS AS TO THE NATURE OF THE INJUNCTIVE RELIEF ORDERED BY THE COURT OF APPEALS

Petitioners argue that the petition should be granted because there are conflicts among the circuits as to how *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), should be applied.

But the asserted conflicts are not as to any rule of law, rather petitioners suggest they consist of the specific remedies held proper by the various Courts of Appeals in response to a variety of factual patterns. Trying to establish that this complex matrix of factual considerations amounts to some conflict in legal policy among the circuits, both as to the causes of action and the relief ordered, would involve this Court in a factual quagmire.

At one point petitioners note that "other courts have deferred to parties to propose remedies." Pet. for Cert. 19. The cases cited have to do either with consent decrees or an order to submit a plan to comply with the court's order that conditions it found be eliminated. These cases tell us nothing about when or whether a court goes too far in ordering specific relief.

In view of the fact that none of the cases petitioners have cited as being out of step with *Bell v. Wolfish* expressly articulated any holding contrary to it, it was petitioners' burden to show that at least some manner of an implicit legal conflict with *Wolfish* existed in one or more circuits, that the identical conflict was present in the case at bar, and that the identical factual basis for those

conflicts was also present as to still other circuits which were in harmony with *Wolfish*. Petitioners have not made such a showing.

Indeed, petitioners do not demonstrate an indispensable link in that chain, namely that there was a conflict between the present case and *Wolfish*. The opinion of the Court of Appeals makes it clear that it was well aware of the *Wolfish* holding regarding over-interference in prison matters because it quoted an overlapping portion of the very passage from *Wolfish* which petitioners quoted (*compare* Pet. for Cert. 18 *with* A.36). It then went on to reduce the scope of the relief ordered by the District Court in light of *Wolfish*, expressly in deference to prison officials (A.37). There is thus no conflict between the case at bar and *Wolfish*, and therefore any asserted conflict with other circuits is completely irrelevant. Because the present case is harmonious with *Bell v. Wolfish*, certiorari is inappropriate.

II. THERE IS NO CONFLICT WITH *LYTLE V. HOUSEHOLD MANUFACTURING* BECAUSE DETERMINATION OF THE CLAIMS OF THE "OLD PLAINTIFFS" WOULD NOT DETERMINE THE CLAIMS OF THE "NEW PLAINTIFFS"

Petitioners urge that permitting the District Court to determine the claims of the original plaintiffs without a jury "will, through the effect of issue preclusion, effectively deny the right of the defendants to a jury trial of those common issues on the claims of the 'new plaintiffs.' " Pet. for Cert. 22. They assert that "[t]he present case parallels *Lytle [v. Household Manufacturing*, 494 U.S. 545,

110 S.Ct. 1331, 108 L.Ed.2d 504 (1990)] with near precision. . . . " *Id.* at 24.

Actually, the cases are day and night apart. In *Lytle*, one plaintiff had his §1981 claims dismissed erroneously, and this Court said he was entitled to jury trial as to those claims regardless of nonjury determinations by the District Court as to his Title VII claims on some of the same issues. In the present case, there are multiple plaintiffs with essentially the same claims, as to some of whom the defendants have been determined by the Court of Appeals to be entitled to a jury trial because of proper demand, and others, the original plaintiffs, as to whom the defendants are not so entitled. *Lytle* is completely inapposite.

The basic concern of petitioners, that something determined by the District Court on remand as to the original plaintiffs will affect determinations as to the later plaintiffs, is misguided. All that is involved is procedural management. Nothing prevents the District Court from trying all jury issues to a jury, and all court issues to the court. Issue preclusion is not involved at all.

Because there is no conflict with a decision of this Court, certiorari is inappropriate.

CONCLUSION

Petitioners have failed to demonstrate that a grant of certiorari is appropriate, and therefore it should be denied.

Respectfully submitted,

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